HARVARD

LAW REVIEW.

VOL. XV. JUNE, 1902. NO. 10

CONTRACTS FOR THE BENEFIT OF A THIRD PERSON.

"IN no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the answer to the question: Whether a right of action accrues to a third person from a contract made by others for his benefit? Nor is the strife ended; for if it be granted that the scale inclines in favor of practice, yet the advocates of this result are continually endeavoring to extend the territory which they have conquered and to apply the doctrines thereby established to cases which should be governed by other principles."

These sentences are translated from the opening lines of a German treatise.[1] The fact that they are as applicable to the common law in America as to the system of law of which the author wrote is enough to show that the subject presents intrinsic difficulties. But no one who examines the cases carefully can fail to note how much confusion has been caused by neglect of important distinctions. The first step towards a clear understanding of contracts for the benefit of third persons is to differentiate several legally distinct states of fact in which third persons are interested.

Rights of property may arise simultaneously with the making of a contract, and may be enforced by the owner though he was not a party to the contract. His right of action is not based on the law

[1] Busch, Doctrin und Praxis über die Gültigkeit von Verträgen zu Gunsten Dritter. (Heidelberg, 1860.)

of contracts, but on the law of property. Such a right may be legal or equitable. When a seller ships goods in fulfilment of an order, for instance, the legal title to the goods ordinarily passes to the consignee at the time of shipment, which is the time when the carrier contracts with the consignor to deliver the goods to the consignee. If the carrier loses or misdelivers the goods the consignee can sue the carrier or indeed any one else who may have dealt with the goods wrongfully, not by virtue of the contract which the carrier has made, but because of the rights of property which arose when that contract was made. If, indeed, the liability of the carrier depends wholly on a promise in the bill of lading, then the question must arise, who can sue on the contract contained in the bill of lading.[1] The case of the carrier is typical. Whenever property other than negotiable paper or money is delivered, in accordance with a contract of sale, to a third person for the purchaser, the title will ordinarily pass to the purchaser at that time, and he will acquire a right of action though not a party to the contract made between the seller and bailee. The right of property transferred in many cases, however, is equitable. Whenever property is delivered to one person under such circumstances that the legal title passes to him, but he undertakes to deliver that specific property or its proceeds to a third person or use the property for his benefit, the relation of trustee and *cestui que trust* arises. When money or negotiable paper payable to bearer or indorsed in blank is delivered to another the legal title will generally if not necessarily pass, and the right of the person for whose benefit the delivery is made will be equitable, though in the case of money the appropriate remedy of the *cestui que trust* is ordinarily money had and received.[2] The fact that the remedy in such cases is in assumpsit has often blinded courts to the fact that the right of action is not based on principles of contract.[3]

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[1] See Elliott on Railroads, § 1692.

[2] "Whenever one person has in possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances." Roberts *v.* Ely, 113 N. Y. 128, 131. See also McKee *v.* Lamon, 159 U. S. 317, 322; Nebraska Bank *v.* Nebraska Hydraulic Co., 14 Fed. Rep. 763.

[3] The mistakes are twofold. Cases of trust are treated as involving merely questions of contract. Allen *v.* Thomas, 3 Met. (Ky.) 198; Price *v.* Trusdell, 28 N. J. Eq. 200, 202; Bennett *v.* Merchantville Building Assoc., 44 N. J. Eq. 116; Del. & Hudson Canal Co. *v.* Westchester Bank, 4 Denio 97. Cases of mere contract rights are called

Such rights of property are not generally hard to distinguish from contract rights, though in many cases courts have confused the two. The inquiry whether a specific fund or *res* is to be transferred to the beneficiary furnishes a ready test.

More difficult than the distinction between contract rights and property rights is the distinction between cases involving the latter and cases of revocable agency. Unquestionably a man can create a trust for the benefit of another so absolute that the settlor cannot regain the property forming the subject of the trust. On the other hand, one may give money or property to an agent with instructions to give it to a third person, and before the mandate is executed it may be revoked. Where is the line which divides the first from the second case. No other test can be found than that furnished by the intention of the settlor or principal as indicated by his words and conduct, when he enters into the transaction. If his expressed intention read in connection with all the circumstances of the case indicates that the delivery was to be a finality, that the money or property was to be from that moment dedicated to the third person, the law will give effect to the intention and give the latter a property right from that time. It is true that this cannot be done against his will, but if there is no duty or obligation required from him in return for the property he is to receive, no expression of assent is required.[1] Assent may be implied or it may be said perhaps more accurately that the property right vests without assent subject to the possibility of rejection. On the other hand, if the use of the money or property was intended to be subject to the directions of the person delivering it, if the holding was for his benefit and under his orders, the relation is that of principal and agent and the third person can acquire no rights until the agency has been executed either by actual transfer to the third person or by some express or implied attornment to him by the agent. Mere notice to the third person that an agency has been created cannot make it irrevocable, nor can even acceptance or change of position by the third person, unless either the principal or the agent with authority from the principal has made an offer that the holding shall be for the benefit of the third party if he so elects.

The statement of these principles is easier than the application

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trusts. Follansbee *v.* Johnson, 28 Minn. 311; Rogers *v.* Gosnell, 51 Mo. 469. The true distinction is well presented by the facts and is explained in the opinions in Fay *v.* Sanderson, 48 Mich. 259; Hidden *v.* Chappel, 48 Mich. 527. See also Belknap *v.* Bender, 75 N. Y. 446; Roberts *v.* Ely, 113 N. Y. 128.

[1] Ames, Cas. Trusts, 2d ed., 232, note; Perry on Trusts, 5th ed., § 105.

of them to concrete facts. One of the commonest cases involving the distinction is that of a general assignment by a debtor for the benefit of his creditors. The English courts hold that the delivery of such an assignment vests no rights in the creditors.[1] Yet it gives rise to something more than a mere agency, for when the creditors assent, the assignment cannot be revoked.[2] It is in effect, therefore, under the English view, an offer to the creditors of a trust for their benefit. Until the offer is accepted, but no longer, the assignee is agent or trustee for the assignor. In the United States such assignments are held, with better reason, to create irrevocable trusts from the moment the deed is executed.[3]

Another illustration is furnished by the facts of a New York case.[4] Money was deposited in a bank by a corporation which owed coupon bonds to meet a series of coupons about to fall due. The bank agreed to apply the money to the payment of the coupons. Before the coupons had actually been paid a creditor of the corporation sued it, and garnisheed the bank. It was held that the bank had become a trustee for the coupon holders, and that the corporation had no right which could be attached. But where goods were put into A's hands, to sell as the owner should direct and distribute the proceeds among certain creditors, it was held that only a revocable agency was created.[5] So where an agent who received money from his principal to pay over to a creditor subsequently used the money otherwise for his principal's benefit, and the principal assented, it was held that the creditor had acquired no rights.[6]

In another respect the law of agency touches the borderland of contracts for the benefit of a third person. It is familiar law that if a contracting party either is or assumes to be the agent of another, the latter may sue upon the contract. The right of a third person benefited by a contract to sue upon it has sometimes been defended on the ground that the promisee was the agent of the third person. But the existence of an agency is a question of fact. It cannot be assumed as a convenient piece of machinery when in fact there was no agency.

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[1] Garrard *v.* Lauderdale, 3 Sim. 1; Smith *v.* Keating, 6 C. B. 136.

[2] Ibid.

[3] Burrill on Assignments, 6th ed., § 257 *seq.*

[4] Rogers Locomotive Works *v.* Kelley, 88 N. Y. 234. Compare Mayer *v.* Chattahoochee Bank, 51 Ga. 325.

[5] Comley *v.* Dazian, 114 N. Y. 161. See also Keithley *v.* Pitman, 40 Mo. App. 596; Kelly *v.* Babcock, 49 N. Y. 318.

[6] Dixon *v.* Pace, 63 N. C. 603. See also Center *v.* McQuesten, 18 Kan. 476.

Novations and offers of novation must also be distinguished from the other legal relations with which this paper deals. The aim of the novation is to substitute for an existing obligation another right. To work a novation, it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made out by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.[1]

Promises for the benefit of a third party must also be distinguished from promises to one who has not given the consideration for the promise. It is laid down in the books that consideration must move from the promisee, and it is sometimes supposed that infringement of this rule is the basis of the objection to allowing an action by a third person upon a promise made for his benefit. Such is not the case. In such promises the consideration does move from the promisee, but the beneficiary who seeks to maintain an action on the promise is not the promisee. The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason why A should not be able for a consideration received from B to make an effective promise to C. Unquestionably he may in the form of a promissory note,[2] and the same result is generally reached in this country in the case of an ordinary simple contract.[3]

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[1] See an article on Novation by Professor Ames, 6 HARV. L. REV. 184. Also Knisely *v.* Brown, 95 Ill. App. 516; Hamlin *v.* Drummond, 91 Me. 175; Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 15 N. H. 129; Smart *v.* Tetherly, 58 N. H. 310.

[2] Fanning *v.* Russell, 94 Ill. 386; McIntyre *v.* Yates, 104 Ill. 491; Hall *v.* Jones, 78 Ind. 466; Mize *v.* Barnes, 78 Ky. 506; Eaton *v.* Libbey, 165 Mass. 218; Horn *v.* Fuller, 6 N. H. 511; Farley *v.* Cleaveland, 4 Cow. 432; 9 Cow. 739.

[3] Pigott *v.* Thompson, 3 B. & P. 149, by Lord Alvanley; Bell *v.* Sappington, 111 Ga. 391; sec. 2747 Ga. Code; Schmucker *v.* Sibert, 18 Kan. 104, 111; Cabot *v.* Haskins, 3 Pick. 83; Palmer Bank *v.* Insurance Co., 166 Mass. 189, 195, 196; Van Eman *v.* Stanchfield, 10 Minn. 255; Gold *v.* Phillips, 10 Johns. 412; Lawrence *v.* Fox, 20 N. Y. 268, 270, 271, 276, 277; Rector *v.* Teed, 120 N. Y. 583.

One more preliminary distinction must be made. A trustee can make a contract for the benefit of his *cestui que trust*, and if the contract is not performed may sue and recover full damages. A contract by which A engages to pay B money as trustee for C is unquestionably valid.[1] And if B refuses to enforce the contract, C may bring a bill in equity against A and B, the primary equity of which is to compel the trustee to do his duty, but to avoid multiplicity of actions a court of equity will decree that A pay the money.[2] It is only in case the trustee, who is the promisee, refuses to act, that the beneficiary has a right to sue in this way.[3]

There are two quite distinct types of cases which pass current under the name of promises for the benefit of a third person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay this creditor. These two classes are frequently treated as if their correct solution depended upon the same principles, but there are important distinctions.

The first class is properly called a contract for the benefit of a third person, and the phrase "sole beneficiary" should be reserved for this class. As the promisee has no pecuniary interest in the performance of the promise, he can have, generally speaking, no other intention than to benefit the third person, to give him a right. A typical illustration is a contract of life insurance payable to some one other than the insured. Whatever may be the apparent technical difficulties, it is obvious that justice requires some

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[1] Such contracts are illustrated in Cope *v.* Parry, 2 J. & W. 538; Treat *v.* Stanton, 14 Conn. 445; Mass. Mut. L. I. Co. *v.* Robinson, 98 Ill. 324.

[2] Gandy *v.* Gandy, 30 Ch. D. 57. In this case a promise by a husband to pay trustees money for the support of the promisor's wife and for the education of their children was held enforceable by the wife when the trustees refused to sue. It was said that the trustees merely intervened because husband and wife could not contract. The reasoning and distinctions in this case are not clear. The promise was to pay the trustees, who were contracting parties, but the court did not clearly distinguish the case from that of a promise to pay a beneficiary directly. Cotton, L. J., suggested as an exception to the general rule forbidding one not a party to a contract to sue that "if the contract though in form it is with A is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as *cestui que* trust under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract." In the same case it was held that the children could not sue.

[3] Flynn *v.* Mass. Ben. Assoc., 152 Mass. 288.

remedy to be given the beneficiary. The original bargain was convenient and proper, and the law should find a means to enforce it according to its terms. The technical difficulty is twofold. The beneficiary is not a party to the contract, and apart from some special principle governing this class of cases cannot maintain an action. The promisee, though entitled to sue on the promise on ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, cannot recover substantial damages ;[1] and if it be granted that the wrong of the defendant, not the injury to the plaintiff, furnishes the measure of damages, the beneficiary gains nothing thereby ; for it is no easier to find a principle requiring the promisee to hold what he recovers as a trustee for the beneficiary than to find a principle allowing a direct recovery by the beneficiary against the promisor.[2]

There is no satisfactory solution of these difficulties in the procedure of a court administering legal remedies only. But one of the functions of equity is to provide a remedy where the common law procedure is not sufficiently elastic, and no opportunity can be found for the exercise of this function more appropriate than the sort of case under consideration. Much of the difficulty of the situation arises from the fact that three parties are interested in the contract. Common law procedure contemplates but two sides to a case, and cannot well deal with more. Equity can deal successfully with any number of conflicting interests in one case, since defendants in equity need have no community of interest.

In the case under consideration the only satisfactory relief is something in the nature of specific performance. The basis for equity jurisdiction is the same as in other cases of specific performance. There is a valid contract, and the remedy at law for its enforcement is inadequate. As the promisee and the beneficiary have both an interest in the performance of the promise, either should be allowed to bring suit joining the other as co-defendant with the promisor. In this way all parties have a chance to be heard. There may always be a possible question as to the respective rights of the promisee and the beneficiary, and this question

[1] West v. Houghton, 4 C. P. D. 197 (But see Lloyds *v.* Harper, 16 Ch. D. 290; *Re* Flavell, 25 Ch. D. 89, 97); Peel *v.* Peel, 17 W. R. 586, *per* James, V. C.; Burbank *v.* Gould, 15 Me. 118; Watson *v.* Kendall, 20 Wend. 201; Adams *v.* Union R. R. Co., 21 R. I. 134, 137.

[2] Cleaver *v.* Mut. Reserve Fund Life Assoc., [1892] 1 Q. B. 147, 152.

should not be determined in any litigation to which either is not a party.

The right of the beneficiary in such a contract to maintain an action was suggested in a number of early English cases, but judicial opinion was almost invariably against it.[1] The well-known case of Dutton *v.* Poole,[2] it is true, allowed an action by a child on a promise made to her father, but this decision seems to have been exceptional, and indeed professes not to deny that only a party to a contract could sue upon it. The court held that the child might be so far identified with the parent on account of the nearness of relationship as to be regarded as a party to the contract. This fictitious identification of child with parent is more suited to the notions of early lawyers than to ours. The same kind of reasoning is to be found in cases on marriage settlements where it is said that the children of a marriage are "within the consideration of the marriage" and may sue upon the covenants for their benefit.[3] Dutton *v.* Poole has been overruled and the marriage settlement cases are generally brought within the principle of trusts. Whatever disadvantages the English law on the question may have, it has at least the merit of definiteness. A beneficiary has no legal rights;[4] and though the cases in equity are not all of them easy to reconcile, it seems probable that he has no equitable rights, either against the promisor or the promisee. In a recent case Lindley, L. J., said:—

"An agreement between A and B that B shall pay C gives C no right of action against B. I cannot see that there is in such a case any difference between equity and Common Law. It is a mere question of contract."[5]

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[1] See Viner's Abr. I. 333–337.

[2] 1 Vent. 318, s. c. T. Jones 103; 2 Lev. 210.

[3] See Peachey on Marriage Settlements, 56 *seq.*; Pollock on Contracts, 7th ed., 210.

[4] Tweddle *v.* Atkinson, 1 B. & S. 393; Cleaver *v.* Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147. In the latter case, Lord Esher said that apart from statute a policy of insurance on A's life payable to his wife gave her no rights. It would be payable to A's executors, and they would not hold as trustees.

So in Ireland, McCoubray *v.* Thomson, 11 Ir. Rep. C. L. 226; Clitheroe *v.* Simpson, L. R. 4 Ir. 59; and Canada, Faulkner *v.* Faulkner, 23 Ont. 252.

A possible exception to the general rule in England arises where a devise is made subject to the condition that the devisee shall pay a sum of money to another. The acceptance of the devise was held by Lord Holt to create a personal liability to the beneficiary. Ewer *v.* Jones, 2 Ld. Ray. 937; 2 Salk. 415; 6 Mod. 26. This was followed in Webb *v.* Jiggs, 4 M. & S. 119, and not denied in Braithwaite *v.* Skinner, 5 M. & W. 313, but it was suggested that the value of the devise limited the liability of the devisee. For American cases holding the devisee liable see *post*, p. 782, n. 3.

[5] *Re* Rotherham Alum & Chemical Co., 25 Ch. D. 103, 111. See also Eley *v.*

The denial of relief to a beneficiary is so obviously unsatisfactory in the case of life insurance policies that by the Married Women's Property Act in England a wife or husband or children, named as beneficiary in a policy, are entitled to the proceeds of the policy though not to sue for them directly.[1] But the same reasons which demand that relief shall be given in the case of an insurance policy apply to other contracts where the intention of the promisee was to stipulate for a benefit to a third person. Such bargains are unquestionably valid contracts and the law should have sufficient adaptability to enforce them according to their terms.

The case of Tweddle *v.* Atkinson,[2] for instance, is open to as serious criticism as the life insurance case. There the father and father-in-law of the plaintiff agreed that each should pay the plaintiff a sum of money and that he should have power to sue for it. It was held he could not recover on the promise. If the plaintiff could not recover against one who promised to pay him the money, it seems clear that he could have no more rights against the promisee if the latter collected the money from the promisor by way of damages for breach of contract.

Were it not for strained decisions on the law of trusts, the English courts would be obliged to make more unfortunate decisions than they do. In Moore *v.* Darton,[3] money was lent to Moore for which he gave this receipt: "Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye £100, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton." The court held that a trust for Ann Dye had been created; but the provision as to interest is clear evidence that the transaction was a loan, which Moore promised to repay to a beneficiary instead of to the lender.

The second type of case to which reference has been made — a contract to discharge an obligation of the promisee — has been held in England enforceable only by the promisee.[4] This rule does not

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Postive, etc., Life Assurance Co., 1 Ex. D. 88; Melhado *v.* Porto Alegre Ry. Co., L. R. 9 C. P. 503; *Re* Empress Engineering Co., 15 Ch. D. 125; Gandy *v.* Gandy, 30 Ch. D. 57. The remarks in Touche *v.* Metropolitan Ry. Warehousing Co., L. R. 6 Ch. 671, must be regarded as overruled.

The Irish case of Drimmie *v.* Davies, [1899] 1 I. R. 176, however, was a clear case of a promise for the benefit of a third person, and the promise was enforced.

[1] 45 & 46 Vict., c. 75, §11.

[2] 1 B. & S. 393.

[3] 4 De G. & S. 517; Ames, Cas. Trusts, 2d ed., 39. See also M'Fadden *v.* Jenkyns 1 Phillips 153; Ames, Cas. Trusts, 47.

[4] Crow *v.* Rogers, 1 Strange 592; Price *v.* Easton, 4 B. & Ad. 433; *Re* Empress

operate as unjustly as the rule in the other type of cases, for here both the promisee and the third party have an adequate remedy. The object of such a contract must always be primarily and generally solely to secure an advantage to the promisee. He wishes to be relieved from liability, and he exacts a promise to pay the third person only because that is a way of relieving himself. If the promisor breaks his promise the promisee suffers material damage, namely the amount of the liability which should have been discharged and which in fact still exists, and according to ordinary rules of contract the promisee is liable for this damage.[1] The third person, moreover, can sue his original debtor. He has the right for which he bargained, and if he is given also a direct right against the promisor, the latter is subjected to a double right of action on a single promise, and the creditor is allowed to take advantage of a promise for which he did not furnish the consideration and in which the contracting parties had their own advantage, not his, in mind.

Yet the creditor is not wholly without interest in the promise to pay his claim. That promise is a valuable right belonging to his debtor. If a solvent promisor has agreed to discharge a debt of the promisee to the amount of a thousand dollars, it is as real an increase of the assets of the promisee as a promise to pay the latter directly that sum, or indeed as the actual payment thereof. It should make no difference what form a debtor's assets take. The law should be able to reach them in whatever shape they may be, and compel their application to the payment of debts. Obviously a promise to pay a debt due a third person cannot be taken on an execution against the debtor, nor is it the subject of garnishment; for the promisor, if he is willing to perform his promise, cannot be compelled to do anything else, and as the promise is not to pay the promisee, the promisor cannot be charged as garnishee or trustee for him.[2] The aid of equity is, therefore, necessary in order to

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Engineering Co., 16 Ch. D. 125, 129; Bonner *v.* Tottenham Society, [1899] 1 Q. B. 161. But see Gregory *v.* Williams, 3 Mer. 582.

So in Canada, Henderson *v.* Killey, 17 Ont. App. 456; s. c. *sub nom.* Osborne *v.* Henderson, 18 Can. S. C. 698; Robertson *v.* Lonsdale, 21 Ont. 600.

[1] See *post*, p. 795, *n.* 5.

[2] Creditors other than those specified in the promise were not allowed to garnishee the promisor in Coleman *v.* Hatcher, 77 Ala. 217; Clinton Bank *v.* Studemann, 74 Ia. 104; Rickman *v.* Miller, 39 Kan. 362; Edgett *v.* Tucker, 40 Mo. 523; Baker *v.* Eglin, 11 Oreg. 333; Vincent *v.* Watson, 18 Pa. 96; Putney *v.* Farnham, 27 Wis. 187. See also Pounds *v.* Chatham, 96 Ind. 342. Compare Mayer *v.* Chattahoochee Bank, 51 Ga. 325; Center *v.* McQuesten, 18 Kan. 476.

compel the application of such property to the creditor's claim, and acting as it does by personal decree, equity can readily give the required relief. In a bill against the indebted promisee and the promisor, the court can order the promisor to perform his promise by paying the plaintiff. As the promisee is a party to the litigation, his rights will be concluded by such a decree, and the promisor will not be subjected to the hardship of the possibility of two actions against him by virtue of a single promise.[1] As in the case of garnishment, the payment to the plaintiff will discharge the obligation to the promisee. Indeed the statutes permitting garnishment might readily be extended so as to cover this kind of transaction.[2]

One peculiarity is to be noticed in regard to the application of such a promise to the debt of the promisee. It is a right that not every creditor can take advantage of. As to most property the creditor who first attaches or files a bill acquires whatever rights his debtor has; but a promise to pay A's debt to B cannot be made available by any creditor except B, since the promisor cannot be required to do anything other than what he promised. The only right other creditors than B could have would arise if B collected his claim out of A's general assets. The liability which would then arise on the part of the promisor to A could be made available by any creditor.

If this reasoning is sound the claim of the creditor is a derivative one. His only interest in the promise is the interest which he has in any property belonging to his debtor. This view has considerable support in the decisions in many jurisdictions in regard to promises to assume mortgages.[3] A promise to assume and pay a mortgage for which the promisee is liable can hardly differ in principle from a promise to pay any other debt of the promisee, but the mortgage cases are frequently treated as a class by themselves. A few cases also of promises to pay unsecured debts are based on substantially this theory.[4]

The law in this country has not been much affected by statute. Such statutes as exist are generally of limited application. Many

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[1] The writer is indebted to Professor Ames for this analysis and for authorities and enlightening discussion on many points in this article.

[2] In Vermont garnishment by the creditor specified in the promise is allowed. Corey *v.* Powers, 18 Vt. 587; Chapman *v.* Mears, 56 Vt. 386. See also Henry *v.* Murphy, 54 Ala. 246.

[3] See *infra*, p. 788, 789.

[4] Jesup *v.* Illinois Central R. R. Co., 43 Fed. Rep. 483, 493; Mercantile Trust Co. *v.* Baltimore, etc., R. R. Co., 94 Fed. Rep. 722; Congregational Soc. *v.* Flagg, 72 Vt. 248; Vanmeter's Ex. *v.* Vanmeters, 3 Gratt. 148.

states make a policy of a life insurance for the benefit of a wife or a wife and children good against creditors,[1] but these statutes are silent as to the respective rights of the beneficiary and promisee. In Massachusetts, however, the beneficiary of a life insurance policy is given a right of action.[2] California,[3] North[4] and South Dakota,[5] and Idaho,[6] have the same provision that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." The Louisiana Code[7] allows suit by the beneficiary of a contract, and Virginia[8] and West Virginia[9] have the same provision that "if a covenant or promise be made for the sole benefit of a person with whom it is made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The Georgia Code provides[10] that "if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action though a stranger to the consideration."

The common provision in the so-called code states,[11] that actions shall be brought in the name of the real party in interest, is sometimes referred to as controlling the question,[12] but it seems to have little bearing upon it. The difficult question is whether the third person is the real party in interest. It is a question of substantive law as to the existence of rights rather than of the procedure appropriate for their enforcement. If, as matter of common law, the third person is held entitled to sue in the name of the promisee or to treat the promisee as a trustee for him, the provision would enable him to sue directly in his own name. The English common law, certainly, does not admit the indirect right any more than the direct. The provision has served in some states to add another element of confusion.

In no jurisdiction in this country is the law as strict as it is in England. But there is no uniformity in the law of the several states. That of Massachusetts probably most nearly approaches

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1 3 Am. & Eng. Cyc., 2d ed., 981.
2 Stat. 1894, c. 225.
3 Civ. Code, § 1559.
4 Civ. Code, § 3840.
5 Civ. Code, § 4688.
6 Rev. Stat., § 3221.
7 Art. 1890; Code of Practice, Art. 35.
8 Code, § 2415.
9 Code, c. 71, § 2.
10 Code, § 2747.
11 These statutes are collected in Hepburn, Cases on Code Pleading, 188.
12 Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340; Smith *v.* Smith, 5 Bush 625, 632; Ellis *v.* Harrison, 104 Mo. 270, 277.

the English rigor. Early decisions which followed what was then supposed to be the English law, and gave a direct right to the sole beneficiary of a contract and to a creditor against one who had promised to pay his debt, have been overruled.[1] But by statute, if not otherwise, the beneficiary of a life insurance policy is entitled to the proceeds of the policy as against the personal representatives of the insured,[2] and by a later statute[3] may sue the insurance company in his own name. Further, the Massachusetts court has recently held that a policy of fire insurance insuring the premises of a mortgagor and taken out and paid for by him, if made payable to the mortgagee, may be sued upon by the latter in his own name.[4] The mortgagee's interest in such a policy is essentially the same as any creditor's interest in a promise made to his debtor to pay the debt. It is true the promise of the insurance company is conditional and is not to pay the debt as such, but any payment made by the insurer operates as payment of the debt *pro tanto*, and, if all the parties are solvent it is the mortgagor not the mortgagee who derives benefit from the payment. The only distinction that seems possible to except this case from the general rule in regard to promises to pay a debt to a third person is to regard a policy of insurance as a mercantile instrument, the effect of which is largely determined by business custom[5] and which may be sued on like negotiable paper by the party to whom it is made payable without regard to who furnished the consideration or negotiated the contract. This distinction seems sound. There are also decisions in Massachusetts, not

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[1] Terry *v.* Brightman, 132 Mass. 318; Marston *v.* Bigelow, 150 Mass. 45; Nims *v.* Ford, 159 Mass. 575; Wright *v.* Vermont Life Ins. Co., 160 Mass. 175, overruling Felton *v.* Dickinson, 10 Mass. 287; Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray 376, 382.

[2] Stat. 1887, c. 214, sec. 73.

[3] By statute of 1894, c. 225, a beneficiary may sue in his own name upon all policies of life insurance issued since that date. A decision in regard to this statute is Wright *v.* Vermont Life Ins. Co., 160 Mass. 170.

[4] Palmer Savings Bank *v.* Insurance Co., 166 Mass. 189, following previous practice, which had not before been disputed. The Massachusetts court relies on the fact that most courts in the country allow the mortgagee to sue. This is true. See 11 Am. Encyc. of Pl. and Pr. 394. But such courts also allow any creditor to sue on a promise to pay him made to another.

In Michigan, where as in Massachusetts a creditor cannot sue upon a promise to pay his debt, a mortgagee cannot sue upon insurance of the mortgagor made payable to the mortgagee. Hartford Fire Ins. Co. *v.* Davenport, 37 Mich. 609; Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236. *Conf.* Hopkins Mfg. Co. *v.* Aurora F. & M. Ins. Co., 48 Mich. 148.

See Langdell, Summary Contracts, §§ 49, 51.

overruled, which hold a devisee who has accepted a devise made conditional on payment to another personally liable to the beneficiary.[1]

A large majority of the states allow the sole beneficiary to sue at law;[2] but besides Massachusetts, Connecticut,[3] Michigan,[4] Minnesota,[5] New Hampshire,[6] Vermont,[7] Virginia,[8] and to some degree Pennsylvania,[9] do not allow an action. In Connecticut, Michigan, Vermont, and Virginia, however, it seems that a suit in equity might be maintained.[10] The law of New York is in rather dubious condition. It has been laid down in some cases that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty;[11] but from recent cases it seems that a moral duty is enough, and this gives the court consider-

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[1] Felch *v.* Taylor, 13 Pick. 133; Adams *v.* Adams, 14 Allen 65. In Prentice *v.* Brimhall, 123 Mass. 291, 293, Gray, C. J., explained these decisions by the lack of equity powers in the court when the first decision was made. As no equitable charge on the property could have been enforced, the defendant would have escaped altogether if not held personally liable.

[2] See note I. at end of article.

[3] Baxter *v.* Camp, 71 Conn. 245. The court leaves the question open whether a suit in equity in which the representatives of the promises were joined could be maintained.

[4] Wheeler *v.* Stewart, 94 Mich. 445; Linneman *v.* Moross, 98 Mich. 178. The court left open the question whether there was an equitable right.

[5] Jefferson *v.* Asch, 53 Minn. 446; Union Ry. Storage Co. *v.* McDermott, 53 Minn. 407. In the first of these cases the court says, "Where there is nothing but the promise, no consideration from such stranger and no duty or obligation to him on the part of the promisee, he cannot sue upon it."

[6] Curry *v.* Rogers, 21 N. H. 247.

[7] Crampton *v.* Ballard, 10 Vt. 251; Hall *v.* Huntoon, 17 Vt. 244; Fugure *v.* Mut. Soc. of St. Joseph, 46 Vt. 362. But in Hodges *v.* Phelps, 65 Vt. 303, it was held that a devise subject to the payment of a legacy imposed a personal liability on the devisee, if he accepted the devise.

[8] Ross *v.* Milne, 12 Leigh 204. But see code of 1887, § 2415, construed in Newberry Land Co. *v.* Newberry, 95 Va. 111. In Taliaferro *v.* Day, 82 Va. 79, an accepted devise subject to a legacy was held to impose a personal liability.

[9] Edmundson *v.* Penny, 1 Barr. 334; Guthrie *v.* Kerr, 85 Pa. 303. See, however, Ayer's Appeal, 28 Pa. 179; Merriman *v.* Moore, 90 Pa. 78, 81; Hostetter *v.* Hollinger, 117 Pa. 606. If the promisor receives property as the consideration for a promise to make a payment, though the promisor is under no obligation to use the property received or its proceeds for the purpose, the Pennsylvania court apparently by an unwarranted extension of the law of trusts holds the promisor liable.

[10] See cases in preceding notes.

[11] Vrooman *v.* Turner, 69 N. Y. 280, 283; Beveridge *v.* N. Y. Elevated R. R., 112 N. Y. 1, 26; Lorillard *v.* Clyde, 122 N. Y. 498; Townsend *v.* Rackham, 143 N. Y. 516; Sullivan *v.* Sullivan, 161 N. Y. 554; Coleman *v.* Hiler, 85 Hun 547. See also Glens Falls Gas Light Co. *v.* Van Vranken, 11 N. Y. App. Div. 420; Opper *v.* Hirsch, 68 N. Y. Supp. 879. Compare the cases of Little *v.* Banks, 85 N. Y. 281, and Todd *v.* Weber, 95 N. Y. 181.

able latitude.[1] Minnesota has adopted the same distinction.[2] Missouri also has held some duty necessary and a moral duty sufficient,[3] but the latest decision inconsistently dispenses with the requirement.[4] A suggestion of the sort is occasionally found in other states.[5] The supposed necessity results from a confusion of the two distinct types of cases. The early New York cases bearing on the right of a creditor to sue one who promises the debtor to pay the debt recognized that the creditor's right was derivative and that it was by virtue of his claim against the debtor that he acquired a right to sue upon the promise to the debtor. But the requirement of a debt or duty is wholly inapplicable to contracts for the sole benefit of a third person. It might equally well be said that a gift should be invalid unless the donor was under a duty to make it. Moreover, whenever such a requirement is proper a moral obligation cannot suffice. When an obligation is of such a character that the obligee cannot enforce it directly against the obligor, it can no more furnish the basis for a right against one who has promised the obligor to pay the debt, than it could for the garnishment of a debt due to the obligor. In the first case cited as illustrating the New York rule it was true not only that the promisee was under no duty to the plaintiff, but also that the plaintiff was not intended by the promisee as the beneficiary of the contract. The benefit expected to result to the plaintiff was merely incidental to the general object of the contract. This was sufficient ground for the decision; but in the later cases where the doctrine was applied the result was needlessly to defeat an intended gift.

There are several recurring situations which illustrate the contract for the sole benefit of a third person. The commonest is the case already referred to of a life insurance policy for the benefit of another. This case may well be regarded as depending upon the nature of a policy of insurance as a mercantile instrument. At all events the insurance decisions form a class by themselves, and but little reference is made in them to the general law of con-

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[1] Buchanan *v.* Tilden, 158 N. Y. 109; Knowles *v.* Erwin, 43 Hun 150, affd. 124 N. Y. 633; Whitcomb *v.* Whitcomb, 92 Hun 443; Babcock *v.* Chase, 92 Hun 264; Luce *v.* Gray, 92 Hun 599. In all these cases the promise was to pay money to a dependent relative.

[2] See cases, p. 780, n. 5.

[3] Phoenix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; St. Louis *v.* Von Phul, 133 Mo. 561; Devers *v.* Howard, 144 Mo. 671; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163.

[4] Crone *v.* Stinde, 156 Mo. 262.

[5] Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794.

tracts. Presumably everywhere the beneficiary is given a right to enforce such a policy, and generally by a direct action. This result has been reached in England and Massachusetts by statute, but in most states without the aid of statute.[1]

Another common illustration arises on these or similar facts: A parent gives property to a son, who upon receiving it promises to make specified payments to daughters or others either at once or upon the death of the donor. There is properly no trust or even equitable charge, because it is contemplated that the son shall deal as he sees fit with the property transferred to him and pay the beneficiaries from any source he chooses. Courts are rightly almost universally unwilling to deny the beneficiaries a remedy in such a case.[2] Even in England there are cases that have never been overruled, in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary. If the devisee accepts the gift he is personally liable to perform the duty which he thereby assumes, and his liability is not restricted to the value of the property he has received.[3] So far as this question of

[1] 45 & 46 Vict. c. 75, § 11; Mass. Stats. 1887, c. 214, § 73; 1894, c. 225. (See Cleaver *v.* Mut. Reserve Fund Life Assoc., [1892] 1 Q. B. 147; Nims *v.* Ford, 159 Mass. 575; Wright *v.* Vermont Life Ins. Co., 160 Mass. 170.) Numerous authorities in other jurisdictions are collected in 3 Am. & Eng. Cyc. 980.

[2] Beals *v.* Beals, 20 Ind. 163; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Stevens *v.* Flannagan, 131 Ind. 122; Weinreich *v.* Weinreich, 18 Mo. App. 364; Knowles *v.* Erwin, 43 Hun 150; 124 N. Y. 633; Luce *v.* Gray, 92 Hun 599; Thompson *v.* Gordon, 3 Strobh. 196. See also Lawrence *v.* Oglesby, 178 Ill. 122.

Contra are Townsend *v.* Rackham, 143 N. Y. 516; Coleman *v.* Hiler, 85 Hun 547 (the promisee in these cases was under no moral duty to the beneficiaries); Guthrie *v.* Kerr, 85 Pa. 303 (*conf.* Hostetter *v.* Hollinger, 117 Pa. 606). Relief in an action at law was also denied in Baxter *v.* Camp, 71 Conn. 245, and Linneman *v.* Moross, 98 Mich. 178; but it was suggested that the plaintiff might have a remedy in equity.

[3] Ewer *v.* Jones, 2 Ld. Ray. 937; 2 Salk. 415; 6 Mod. 26; Webb *v.* Jiggs, 4 M. & S. 119; Braithwaite *v.* Skinner, 5 M. & W. 313. In the last case it was said by some of the judges that the plaintiff's recovery would be restricted to the value of the land.

In this country the devisee is personally liable without restriction. Harland *v.* Person, 93 Ala. 273; Williams *v.* Nichol, 47 Ark. 254; Millington *v.* Hill, 47 Ark. 301; Lord *v.* Lord, 22 Conn. 595; Olmstead *v.* Brush, 27 Conn. 530; Zimmer *v.* Sennott, 134 Ill. 505; Porter *v.* Jackson, 95 Ind. 210; Owing's Case, 1 Bland 370; Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray 376, 382; Adams *v.* Adams, 14 Allen 65; Prentice *v.* Brimhall, 123 Mass. 291, 293; Smith *v.* Jewett, 40 N. H. 530, 535; Wiggin *v.* Wiggin, 43 N. H. 561; Glen *v.* Fisher, 6 Johns. Ch. 33; Gridley *v.* Gridley, 24 N. Y. 130; Loder *v.* Hatfield, 71 N. Y. 92; Brown *v.* Knapp, 79 N. Y. 136; Yearly *v.* Long, 40 Ohio St. 27; Flickinger *v.* Saum, 40 Ohio St. 591; Hoover *v.* Hoover, 5 Pa. 351; Etter *v.* Greenwalt, 98 Pa. 422; Dreer *v.* Pennsylvania Co.,

personal liability is concerned these cases present quite as much difficulty in principle as the cases where the gift is made *inter vivos*.

In most jurisdictions no distinction is made when the promise is based on valid consideration other than a transfer of property; for instance, services or forbearance of a claim.[1]

It is a common stipulation in a building contract that the contractor will pay all bills for labor and materials. In most cases the fulfilment of this promise by the contractor operates to discharge a liability of the owner of the building, whose building would be liable to satisfy the liens given by the law to workmen and materialmen. It cannot, therefore, be inferred that the promisee requires the promise in order to benefit such creditors of the contractor. The natural inference is that his object is to protect himself or his building. When, however, the owner of the building is a municipality, or county, or state, such an inference cannot so readily be justified, for the laws give no liens against the buildings of such owners. In such cases if the stipulation can be regarded as the result of more than the accidental insertion of a provision common in building contracts without reflection as to its necessity, it must be supposed that the object was to benefit creditors of the contractor. This supposition becomes a certainty when the legislature in view of litigation in the courts in regard to the matter enacts that all building contracts made by towns or counties shall contain such a stipulation. Creditors have in some states been allowed not only to take advantage of the promise but to sue the contractor and his sureties upon a bond given by him to secure the performance of his contract.[2]

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108 Pa. 26; Jordan *v.* Donahue, 12 R. I. 199; Hodges *v.* Phelps, 65 Vt. 303; Taliaferro *v.* Day, 82 Va. 79.

[1] Allen *v.* Davison, 16 Ind. 416; Marcett *v.* Wilson, 30 Ind. 240; Strong *v.* Marcy, 33 Kan. 109; Clarke *v.* McFarland's Exec., 5 Dana 45; Benge *v.* Hiatt's Adm., 82 Ky. 666; Felton *v.* Dickinson, 10 Mass. 287 (overruled by Marston *v.* Bigelow, 150 Mass. 45); Todd *v.* Weber, 95 N. Y. 181; Buchanan *v.* Tilden, 158 N. Y. 109; Whitcomb *v.* Whitcomb, 92 Hun 443; Babcock *v.* Chase, 92 Hun 264.

See also Lawrence *v.* Oglesby, 178 Ill. 122.

But in Pennsylvania, though the promise is perhaps enforceable by the beneficiary when the consideration is the transfer of property, it is not if the consideration is anything else. Edmundson *v.* Penny, 1 Barr 334. See also Washburn *v.* Interstate Investment Co., 26 Oreg. 436.

[2] Baker *v.* Bryan, 64 Ia. 561 (but see Hunt *v.* King, 97 Ia. 88); St. Louis *v.* Von Phul, 133 Mo. 561 (overruling Kansas City Sewer Pipe Co. *v.* Thompson, 120 Mo. 218); Devers *v.* Howard, 144 Mo. 671; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163; Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794; Doll *v.* Crume, 41 Neb. 655; Korsmeyer Co. *v.* McClay, 43 Neb. 649; Kaufmann *v.* Cooper, 46 Neb. 644;

A somewhat similar case arises where a water company contracts to furnish water sufficient to supply the hydrants of a town or district, and the failure of the water company to keep its promise to the town results in the destruction of a building by a fire which might have been extinguished but for the lack of water. The owner of the house is not generally allowed to sue on such a promise. Though the town or district which is the promisee, not being itself liable for the lack of water or for the destruction of the building, has no pecuniary interest in the performance of the promise, yet it may be doubted whether the stipulation was exacted for the benefit of such people as might have their buildings destroyed from lack of water. It is a more reasonable construction that the object of the promise is to benefit the community as a whole. Whatever may be the reason, the plaintiff is not usually allowed to recover in such cases.[1]

A telegraph company's contract made with the sender of a telegram to deliver it to the person addressed is sometimes treated as a contract made for the sole benefit of the latter, who is allowed to sue for this reason.[2] In some cases this construction is fair enough, but senders of telegrams perhaps more frequently are seeking objects of their own rather than the benefit of another.

One of the numerous ways of making out a fictitious considera-

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Hickman *v.* Loyal, 47 Neb. 816; King *v.* Murphy, 49 Neb. 670; Rohman *v.* Gaiser, 53 Neb. 474; Pickle Marble Co. *v.* McClay, 54 Neb. 661. *Contra*, Jefferson *v.* Asch, 53 Minn. 446; Union Ry. Storage Co. *v.* McDermott, 53 Minn. 407; Buffalo Cement Co. *v.* McNaughton, 90 Hun 74; 156 N. Y. 702; 157 N. Y. 703; Parker *v.* Jeffery, 26 Oreg. 186; Brower Lumber Co. *v.* Miller, 28 Oreg. 565. See also Montgomery *v.* Rief, 15 Utah 495.

An action on the bond presents the difficulty that the plaintiffs not only are not the promisees, but are not the payees. The promise is to pay the penalty of the bond, not to the creditors, but to the town or county. This difficulty is not much alluded to in the cases. See, however, Jefferson *v.* Asch, and Buffalo Cement Co. *v.* McNaughton, *supra*.

[1] Boston Safe Deposit Co. *v.* Salem Water Co., 94 Fed. Rep. 240; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24; Fowler *v.* Water Co., 83 Ga. 219; Davis *v.* Water Works, 54 Ia. 59; Becker *v.* Keokuk Water Works, 79 Ia. 419; Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; Eaton *v.* Fairbury Water Works, 37 Neb. 546; Ferris *v.* Carson Water Co., 16 Nev. 44; Wainwright *v.* Queens County Water Co., 78 Hun 146; 3 Lea 45. *Contra*, Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340.

[2] Western Union Tel. Co. *v.* Hope, 11 Ill. App. 291 (but see Western Union Tel. Co. *v.* Dubois, 128 Ill. 248); Western Union Tel. Co. *v.* Fenton, 52 Ind. 3 (statutory); Markel *v.* Western Union Tel. Co., 19 Mo. App. 80 (statutory); Aiken *v.* Western Union Tel. Co., 5 S. C. 371; Western Union Tel. Co. *v.* Jones, 81 Tex. 271. The cases allowing a right of action, based on various reasons, are collected in Joyce on Electric Law, § 1008.

tion for charitable subscriptions is to regard the promises of the subscribers as mutual promises to pay the beneficiary, who is then allowed to sue as on a contract made for its benefit.[1] In fact, in such subscriptions the promise, on a fair construction, almost always runs directly to the beneficiary or to trustees representing it.

In a recent New Jersey case[2] the beneficiary was undetermined when the contract was made. The defendant contracted to pay $750 to the owner of the foal by the defendant's stallion that first trotted a mile in 2.30. The plaintiff who answered the description was allowed to sue on the contract though not a party to it.

A decision in Indiana[3] presents the rather unusual case of the enforcement by injunction of a promise for the benefit of a third person. The defendant as lessee of certain premises had covenanted with the lessor to sell on the premises no beer except that manufactured by the plaintiff company. The lessor was a relative of stockholders in the company, but had no pecuniary interest in the matter. The company was granted an injunction to enforce the covenant.[4]

It is in regard to contracts to discharge a debt of the promisee that the greatest confusion prevails. In the first place the intrinsic difficulty of the case is greater than where the third person is the sole beneficiary of the contract. Trust, agency, novation, must here be carefully distinguished, and the facts may not clearly indicate in which class a particular case belongs, since the parties may not have sufficiently expressed any intention. Further, it is in this class of cases that the reasoning of the courts is most artificial. New York by the decision of Lawrence *v.* Fox[5] has done more than any other jurisdictions to spread and strengthen the theory that a third person can sue on such a contract. In a later case[6] the New York court said:—

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[1] Rogers *v.* Galloway Female College, 64 Ark. 627; Wilson *v.* First Presbyterian Church, 56 Ga. 554; Irwin *v.* Lombard University, 56 Ohio St. 9, 20. See also Hale *v.* Ripp, 32 Neb. 259; Roberts *v.* Cobb, 31 Hun 150; Parsons, Contracts, 8th ed., 468 *seq.* *Contra* is Curry *v.* Rogers, 21 N. H. 247. A curious case where the promises actually were by the subscribers to each other is New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338. A number of hatters agreed to close their shops on Sunday. For any breach it was agreed that the offender should pay the plaintiff $100. The plaintiff was not allowed to recover because its benefit was not the object of the contract.

[2] Whitehead *v.* Burgess, 61 N. J. L. 75.

[3] Ferris *v.* American Brewing Co., 155 Ind. 539.

[4] And in Chicago, etc., R. R. *v.* Bell, 44 Neb. 44, an agreement not to sue a third person was effectively used as a bar to an action against the latter. See also Ayer's Appeal, 28 Pa. 179.

[5] 20 N. Y. 268.

[6] Simson *v.* Brown, 68 N. Y. 355, 361.

"It is not every promise made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

This language or similar language is adopted in other cases.[1] Do the courts which use it really believe that the intent of the promisee in such a case as Lawrence *v.* Fox is to benefit the third party? When a grantor of premises subject to a mortgage requires the grantee to assume and agree to pay the mortgage, is it the welfare of the mortgagee that the grantor is considering, or is it his own? Whatever may be the answer to these questions, the jurisdictions are few which do not allow the creditor a direct action at law against the promisor. Connecticut,[2] Massachusetts,[3] Michigan,[4] and North Carolina[5] are absolutely committed against the doctrine. The United States Supreme Court,[6] Maryland,[7] New Hampshire,[8]

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[1] Central Trust Co. *v.* Berwind-White Co., 95 Fed. Rep. 391; Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Hall *v.* Alford, 49 S. W. Rep. 444 (Ky.); Jefferson *v.* Asch, 53 Minn. 446; State *v.* St. Louis, etc., R. R., 125 Mo. 596, 617; Garnsey *v.* Rogers, 47 N. Y. 233; Vrooman *v.* Turner, 69 N. Y. 280, 283; Beveridge *v.* N. Y. Elevated R. R., 112 N. Y. 1, 26; Parker *v.* Jeffery, 26 Oreg. 186, 188.

[2] Morgan *v.* Randolph-Clowes Co., 73 Conn. 396. See also Baxter *v.* Camp, 71 Conn. 245. These cases overrule earlier decisions, *e. g.* Crocker *v.* Higgins, 7 Conn. 342; Steene *v.* Aylesworth, 18 Conn. 244, 252.

[3] Mellen *v.* Whipple, 1 Gray 317; Flint *v.* Pierce, 99 Mass. 68; Exchange Bank *v.* Rice, 107 Mass. 37; Rogers *v.* Union Stone Co., 130 Mass. 581; Aigen *v.* Boston & Maine R. R., 132 Mass. 423; Morrill *v.* Allen, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410; White *v.* Mt. Pleasant Mills, 172 Mass. 462. See also cases of mortgage, *post*, p. 787, n. 7.

[4] Pipp *v.* Reynolds, 20 Mich. 88; Turner *v.* McCarty, 22 Mich. 265; Halsted *v.* Francis, 31 Mich. 113; Hartford Fire Ins. Co. *v.* Davenport, 37 Mich. 609; Hicks *v.* McGarry, 38 Mich. 667; Hunt *v.* Strew, 39 Mich. 368, 371; Booth *v.* Conn. Mut. Life Ins. Co., 43 Mich. 299; Ayres *v.* Gallup, 44 Mich. 13; Edwards *v.* Clements, 81 Mich. 513; Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236; Bliss *v.* Plummer's Extr., 103 Mich. 181.

[5] Morehead *v.* Wriston, 73 N. C. 398; Peacock *v.* Williams, 98 N. C. 324; Woodcock *v.* Bostic, 118 N. C. 822.

[6] National Bank *v.* Grand Lodge, 98 U. S. 123. See also Constable *v.* National S. S. Co., 154 U. S. 51; Johns *v.* Wilson, 180 U. S. 440; Nebraska Bank *v.* Nebraska Hydraulic Co., 14 Fed. Rep. 763; Jesup *v.* Illinois Central Co., 43 Fed. Rep. 483, 493; Hennessy *v.* Bond, 77 Fed. Rep. 405; Mercantile Trust Co. *v.* Baltimore & Ohio Co., 94 Fed. Rep. 722.

[7] Hand *v.* Evans Marble Co., 88 Md. 226. But see Small *v.* Schaefer, 24 Md. 143; Seigman *v.* Hoffacker, 57 Md. 321.

[8] Warren *v.* Batchelder, 15 N. H. 133. *Conf.* Warren *v.* Batchelder, 16 N. H. 580; Lang *v.* Henry, 54 N. H. 57; Hunt *v.* New Hampshire Fire Assoc., 68 N. H. 305, 308. In the case last cited the court say, "The debt is in equity his debt." "If for

Pennsylvania,[1] and Wyoming,[2] at least, do not accept it unequivocally. A few other jurisdictions apart from local statutes or codes of procedure would hold the creditors' only right to be derivative and in equity.[3]

The most universal illustration of the right of the creditor to sue is where the grantee of premises subject to a mortgage assumes and agrees to pay the mortgage. In England,[4] Ireland,[5] and Canada[6] this gives the mortgagee no right. But the only state in this country where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts.[7] Of the other jurisdictions which do not accept the doctrine of

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technical reasons the law is powerless to enforce the duty, equity is subject to no such weakness."

[1] Blymire *v.* Boistle, 6 Watts 182; Ramsdale *v.* Horton, 3 Barr 330; Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470; Kountz *v.* Holthouse, 85 Pa. 235, 237; Adams *v.* Kuehn, 119 Pa. 76; Freeman *v.* Pennsylvania R. R. Co., 173 Pa. 274. But see Strohecker *v.* Grant, 16 S. & R. 237, 241; Hind *v.* Holdship, 2 Watts 104; Commercial Bank *v.* Wood, 7 W. & S. 89; Vincent *v.* Watson, 18 Pa. 96; Bellas *v.* Fagely, 19 Pa. 273; Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens, 106 Pa. 173; Delp *v.* Brewing Co., 123 Pa. 42. See also mortgage cases, *post*, p. 809.

The rule in Pennsylvania seems to be that in general the creditor cannot sue, but "among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor." Adams *v.* Kuehn, 119 Pa. 76, 86. The first exception thus stated is that of a trust, but in its application of the rule the Pennsylvania court has gone beyond trusts properly so called.

[2] McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

[3] The early Indiana law allowed a remedy in equity only. Bird *v.* Lanius, 7 Ind. 615; and since the code has made legal and equitable procedure the same, it has still been recognized that the creditor's right is equitable. Davis *v.* Calloway, 30 Ind. 112; Hendricks *v.* Frank, 86 Ind. 278, 284. Aside from statute it is probable that in Virginia and West Virginia the creditor would be allowed only an equitable right.

[4] Tweddell *v.* Tweddell, 2 Bro. Ch. 152; Oxford *v.* Rodney, 14 Ves. 417; Barham *v.* Thanet, 3 M. & R. 607; *Re* Errington, [1894] 1 Q. B. 11; Bonner *v.* Tottenham Society, [1899] 1 Q. B. 161.

[5] Barry *v.* Harding, 1 Jones & Lat. 475, 485.

[6] Aldous *v.* Hicks, 21 Ont. 95; Frontenac Loan Co. *v.* Hysop, 21 Ont. 577. See also Williams *v.* Balfour, 18 Can. S. C. 472. *Re* Cozier, 24 Grant 537, *contra*, is overruled.

[7] Mellen *v.* Whipple, 1 Gray 317; Pettee *v.* Peppard, 120 Mass. 522, 523; Prentice *v.* Brimhall, 123 Mass. 291; Coffin *v.* Adams, 131 Mass. 133; Rice *v.* Sanders, 152 Mass. 108; Creesy *v.* Willis, 159 Mass. 249. No attempt seems to have been made in Massachusetts to enforce the mortgagee's claim by a bill in equity against the mortgagor and his grantee. Apparently it is assumed that no relief would be granted. In Rice *v.* Sanders it is said that the grantee's promise "gave no additional rights to the mortgagee."

Lawrence *v.* Fox, Connecticut[1] and Michigan[2] have statutes which cover the case; the United States Supreme Court[3] and North Carolina[4] give equitable relief on substantially the principles herein advocated; and if the attitude of the Maryland and Pennsylvania courts towards this class of cases is inconsistent with their general rule, they are not deterred on that account from giving the mortgagee relief. It is a curious circumstance that though a promise by a third person to pay a mortgage debt cannot be distinguished in principle from a promise to pay any other debt, the question has been to some extent separately dealt with. Perhaps, because the subject of mortgages fell within the scope of equity jurisdiction, the attempt was early made by mortgagees to sue in equity those who had assumed an obligation to pay the mortgage, while no such attempt was made with other debts. The earlier cases were in New York, and the result of them is thus summarized in a later decision which first extended the mortgagee's right to a direct action at law.

"If the plaintiff had sought to foreclose the mortgages in question and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects."[5]

The earlier New York doctrine has had considerable following in other jurisdictions. Alabama,[6] California,[7] Connecticut,[8] Indi-

[1] Gen. Stat., § 983; Morgan *v.* Randolph-Clowes Co., 73 Conn. 396, 398.

[2] Comp. Laws 1897, § 519; Crawford *v.* Edwards, 33 Mich. 354; Miller *v.* Thompson, 34 Mich. 10; Taylor *v.* Whitmore, 35 Mich. 97; Carley *v.* Fox, 38 Mich. 387; Winans *v.* Wilkie, 41 Mich. 264; Unger *v.* Smith, 44 Mich. 22; Corning *v.* Burton, 102 Mich. 86; Jehle *v.* Brooks, 112 Mich. 131; Terry *v.* Durand Land Co., 112 Mich. 665. It is essential that the grantee and the mortgaged land be within the jurisdiction. Booth *v.* Connecticut Mut. Life Ins. Co., 43 Mich. 299.

[3] See p. 789, n. 8.

[4] See p. 789, n. 4.

[5] Burr *v.* Beers, 24 N. Y. 178, *per* Denio, J., citing Curtis *v.* Tyler, 9 Paige 432; Halsey *v.* Reed, 9 Paige 446; March *v.* Pike, 10 Paige 595; King *v.* Whitely, 10 Paige 465; Blyer *v.* Monholland, 2 Sandf. Ch. 478; Vail *v.* Foster, 4 N. Y. 312; Trotter *v.* Hughes, 12 N. Y. 74; Belmont *v.* Coman, 22 N. Y. 438. See also Wager *v.* Link, 150 N. Y. 549.

[6] Young *v.* Hawkins, 74 Ala. 370.

[7] Williams *v.* Naftzger, 103 Cal. 438; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Tulare County Bank *v.* Madden, 109 Cal. 312; Hopkins *v.* Warner, 109 Cal. 133. In California by statute an independent action cannot be maintained even against the mortgagor on a debt secured by mortgage. Code Civ. Proc., §720. The mortgaged property must first be exhausted. Stockton Saving & Loan Soc. *v.* Harrold, 127 Cal. 612, 617.

[8] Bassett *v.* Bradley, 48 Conn. 224. See also Gen. Stat., §983; Morgan *v.* Randolph-Clowes Co., 73 Conn. 396, 398.

ana,[1] Maryland,[2] Michigan,[3] New Jersey,[4] North Carolina,[5] North Dakota,[6] Vermont,[7] Virginia,[8] and the United States Supreme Court[9] have adopted it. The phrase commonly used is that the mortgagee is "subrogated" to the rights of the mortgagor, who is the promisee. The use of the word subrogation is not wholly fortunate. It suggests analogies which do not exist, with the position of a surety who has paid the debt. In fact, it is merely the application by a court of equity of property of a debtor, the mortgagor, to the payment of the debt; and whatever terminology is used there is no doubt that this is substantially the meaning of the courts which have followed the early New York decisions.

Even courts which derive the right of the mortgagee to sue the grantee from his right to enforce the mortgagor's rights, too frequently allow the suit to be maintained without joinder of the mortgagor. The essential reason why the proceeding should be in equity is because the mortgagor ought to be joined, since it is his property — that is, a promise to him — of which the plaintiff is seeking to avail himself, and that property should not be taken without giving the owner his day in court. Moreover, it is unfair to the grantee to charge him at the suit of the mortgagee unless at the same time all claim against him on the part of the mortgagor is extinguished. This cannot be judicially determined unless the mortgagor is joined.[10]

It frequently happens that several grantees successively buy the

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[1] See cases cited, p. 808, n. III.

[2] George *v.* Andrews, 60 Md. 26; Chilton *v.* Brooks, 72 Md. 554; Stokes *v.* Detrick, 75 Md. 256.

[3] Crawford *v.* Edwards, 33 Mich. 354; Miller *v.* Thompson, 34 Mich. 10; and see *supra*, p. 788, n. 2.

[4] Klapworth *v.* Dressler, 13 N. J. Eq. 62; Pruder *v.* Williams, 26 N. J. Eq. 210; Crowell *v.* Currier, 27 N. J. Eq. 152, 650; Wise *v.* Fuller, 29 N. J. Eq. 257; Green *v.* Stone, 54 N. J. Eq. 387; Whittaker *v.* Belvidere Co., 55 N. J. Eq. 674, 688.

[5] Woodcock *v.* Bostic, 118 N. C. 822.

[6] Moore *v.* Booker, 4 N. Dak. 543.

[7] Davis *v.* Hulett, 58 Vt. 90; Hodges *v.* Phelps, 65 Vt. 303.

[8] Willard *v.* Worsham, 76 Va. 392; Osborne *v.* Cabell, 77 Va. 462; Francisco *v.* Shelton, 85 Va. 779; Fisher *v.* White, 94 Va. 370; Ellett *v.* McGhee, 94 Va. 377.

[9] Keller *v.* Ashford, 133 U. S. 610; Willard *v.* Wood, 135 U. S. 309, 314. See also Winters *v.* Hub Mining Co., 57 Fed. Rep. 287. But in a case arising under the Arizona Code, which assimilates legal and equitable procedure, a direct action was allowed against the grantee in Johns *v.* Wilson, 180 U. S. 440.

[10] In Keller *v.* Ashford, 133 U. S. 610, 626, the court noticed the question and disposed of it thus: "Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief." See also Miller *v.* Thompson, 34 Mich. 10; Pruden *v.* Williams, 26 N. J. Eq. 210.

premises and assume payment of the mortgage. It is rightly held that the last grantee can be charged as well as the immediate grantee of the mortgagor. The same reasoning which justifies charging the first grantee through his obligation to the mortgagee's debtor requires the application of the obligation of the second grantee to the first grantee in order to satisfy the obligation of the latter to the mortgagor, and so on.[1]

Moreover, all who have assumed the mortgage may be charged though they have parted with the premises.[2] They have made a valid contract to pay the mortgage, which they cannot abrogate by selling the premises, though they may get such protection as the promise of their grantee to assume the mortgage can give. As between the grantor and grantee, the latter becomes principal debtor and the former a surety. Accordingly, if the mortgagee gives time to the grantee, he forfeits his right to assert a claim against the grantor.[3] The doctrine would be more exactly expressed if it were said that the mortgagee forfeited his right to collect his claim against the mortgagor out of any property other than the promise of the grantee.

A curious situation arises when a mortgagor transfers the premises to one who, though taking them subject to the mortgage,

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[1] See *e. g.* Flint *v.* Cadenasso, 64 Cal. 83; Ingram *v.* Ingram, 71 Ill. App. 497, 172 Ill. 287; Rick *v.* Hoffman, 69 Ind. 137; Carnahan *v.* Tousey, 93 Ind. 561; Corning *v.* Burton, 102 Mich. 86; Gifford *v.* Corrigan, 117 N. Y. 257.

[2] Ingram *v.* Ingram, 71 Ill. App. 497, 172 Ill. 287; Carnahan *v.* Tousey, 93 Ind. 561; Corning *v.* Burton, 102 Mich. 86.

[3] Union Life Ins. Co. *v.* Hanford, 143 U. S. 187; Union Stove Work *v.* Caswell, 48 Kas. 689; George *v.* Andrews, 60 Md. 26; Chilton *v.* Brooks, 72 Md. 554; Metz *v.* Todd, 36 Mich. 473; Dedrick *v.* Blyker, 85 Mich. 475; Commercial Bank *v.* Wood, 56 Mo. App. 214; Wayman *v.* Jones, 58 Mo. App. 313; Nelson *v.* Brown, 140 Mo. 580; Merriam *v.* Miles, 54 Neb. 566; Calvo *v.* Davies, 73 N. Y. 211; Paine *v.* Jones, 14 Hun 577; Jester *v.* Sterling, 25 Hun 344; Fish *v.* Hayward, 28 Hun 456; Dillaway *v.* Peterson, 11 S. Dak. 210; Miller *v.* Kennedy, 12 S. Dak. 478; Hull *v.* Hayward, 13 S. Dak. 291; Schroeder *v.* Kinney, 15 Utah 462. See also Hodges *v.* Elyton Co., 109 Ala. 617; Home Nat. Bank *v.* Waterman's Est., 134 Ill. 461. *Contra*, Shepherd *v.* May, 115 U. S. 505; Keller *v.* Ashford, 133 U. S. 610, 625 (but see Union Ins. Co. *v.* Hanford, 143 U. S. 187); Corbett *v.* Waterman, 11 Ia. 86; James *v.* Day, 37 Ia. 164; Connecticut Mut. Life Ins. Co. *v.* Mayer, 8 Mo. App. 18 (overruled); see also Ridgley *v.* Robertson, 67 Mo. App. 45; Aldous *v.* Hicks, 21 Ont. 95. Similarly if a grantee who takes subject to a mortgage, but does not assume payment of it, is given time, the mortgagor is discharged to the extent of the value of the mortgaged property which is the principal debtor. Travers *v.* Dorr, 60 Minn. 173; Murray *v.* Marshall, 94 N. Y. 611; Antisdel *v.* Williamson, 165 N. Y. 372, 375; Bunnell *v.* Carter, 14 Utah 100. But see *contra*, Chilton *v.* Brooks, 72 Md. 554; and the decisions cited above which hold that the mortgagor is not discharged even where the grantee has assumed payment of the mortgage.

does not agree to pay it, and this grantee thereafter transfers the premises to another who by the deed assumes and agrees to pay the mortgage. The promisee has no interest in the performance of this promise, since he is not personally liable for the debt, and he is no longer the owner of the premises. The only intelligent object that can be suggested for requiring the promise from the grantee is a wish to benefit the mortgagee. In that view the case would fall within the first type of promises for the benefit of a third person and the mortgagee would be the sole beneficiary. But it is hard to suppose that the promisee had any such intention. The object in fact of such a stipulation, if its insertion is not altogether a mistake, is doubtless to guard against a supposed or possible liability on the part of the promisee. The decisions which generally deny the mortgagee a right to recover in such a case, therefore, seem sound.[1]

Another peculiar situation arises where a mortgagor makes a second mortgage and the second mortgagee agrees to pay off the first mortgage. Subsequently the first mortgagee endeavors to take advantage of this promise. He is denied the right and justly. In the ordinary case where a purchaser assumes and agrees to pay a mortgage he has received a *quid pro quo* for the amount of the mortgage. He owes the amount of the mortgage to some one. In the case under consideration, however, the second mortgagee does not owe the amount of the first mortgage. He has agreed virtually to lend the amount of it to the mortgagor by paying the first mortgagee. A promise to lend a debtor money, though on technically good consideration, is not one which a court of equity should enforce for the benefit of a creditor. Nor can breach of the promise by the second mortgagee be ground for substantial damages. The only consequence of the breach is that the debtor continues

[1] Ward *v.* De Oca, 120 Cal. 102; Morris *v.* Mix, 4 Kan. App. 654; Brown *v.* Stillman, 43 Minn. 126; Nelson *v.* Rogers, 47 Minn. 103; Crone *v.* Stinde, 68 Mo. App. 122 (reversed); Hicks *v.* Hamilton, 144 Mo. 495 (overruled); Harberg *v.* Arnold, 78 Mo. App. 237 (overruled); Wise *v.* Fuller, 29 N. J. Eq. 257, 266; Norwood *v.* Hart, 30 N. J. Eq. 412; Mount *v.* Van Ness, 33 N. J. Eq. 262, 265; Eakin *v.* Shultz, 47 At. Rep. 274 (N. J. Eq.); King *v.* Whitely, 10 Paige 465; Trotter *v.* Hughes, 12 N. Y. 74; Vrooman *v.* Turner, 69 N. Y. 280; Smith *v.* Cross, 16 Hun 487; Young Men's Assoc. *v.* Croft, 34 Oreg. 106; Portland Trust Co. *v.* Nunn, 34 Oreg. 166; Osborne *v.* Cabell, 77 Va. 462 *semble.*

Recovery was allowed in Cobb *v.* Fishel, 62 Pac. Rep. 625 (Col. App.); Dean *v.* Walker, 107 Ill. 541; Marble Bank *v.* Mesarvey, 101 Ia. 285; Heim *v.* Vogel, 69 Mo. 529; Crone *v.* Stinde, 156 Mo. 262; Hare *v.* Murphy, 45 Neb. 809; Brewer *v.* Maurer, 38 Ohio St. 543; Merriman *v.* Moore, 90 Pa. 78; McKay *v.* Ward, 20 Utah, 149; Enos *v.* Sanger, 96 Wis. 150.

liable to the first mortgagee instead of to the second mortgagee for the amount of the first mortgage. As the rights of the first mortgagee against the promisor cannot exceed the rights of the promisee there is no asset of value applicable to the mortgage. As the court said in the first case that presented these facts, "if the action were allowed, any one who promised to advance money to another to pay his debts would be liable to an action by the creditor." [1]

Another class of promises to satisfy a debtor's liability deserves particular mention — the promise of an individual or firm to pay the liabilities of an outgoing partner. It is in this kind of case that the greatest difficulty arises in determining whether there is a novation. On principle it is clear that to work a novation the promisor must make an agreement with the creditor to become directly liable to him in consideration that the creditor will accept him as debtor in place of the original debtor. It is not enough, therefore, for the creditor to learn of the promise to the original debtor and express assent to that arrangement. Such assent does not necessarily include an agreement to give up the claim against the original debtor. Moreover, the promisor must assent to enter into a contractual relation directly with the creditor. By a curious freak the law of New York [2] does not allow the creditor a remedy on a promise made to his debtor in this class of cases. The law of Pennsylvania,[3] on the other hand, though not generally adopting the doctrine of Lawrence *v.* Fox, makes an exception here in favor of the creditor. In fact, there is no reason for discriminating for or against the creditor here, and so the matter is generally treated.[4]

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[1] Garnsey *v.* Rogers, 47 N. Y. 233. The further distinction suggested by the court that the promise was not made for the benefit of the mortgagee amounts to nothing. It is true, but it is also true in any case where a grantee agrees to pay a mortgage.

The case has been followed several times, and it has been held immaterial that the deed creating the second mortgage is on its face absolute. Pardee *v.* Treat, 82 N. Y. 385; Roe *v.* Barker, 82 N. Y. 431; Root *v.* Wright, 84 N. Y. 72; Cole *v.* Cole, 110 N. Y. 630; Smith *v.* Cross, 16 Hun 487.

A similar principle was applied in favor of a grantee who was a bare trustee in Gifford *v.* Corrigan, 105 N. Y. 223.

[2] Merrill *v.* Green, 55 N. Y. 270; Wheat *v.* Rice, 97 N. Y. 296; Serviss *v.* McDonnell, 107 N. Y. 260; Corner *v.* Mackey, 147 N. Y. 574; Edick *v.* Green, 38 Hun 202. But see Claflin *v.* Ostrom, 54 N. Y. 581; Arnold *v.* Nichols, 64 N. Y. 117; Hannigan *v.* Allen, 127 N. Y. 639.

[3] Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens, 106 Pa. 173; Adams *v.* Kuehn, 119 Pa. 76, 86; Delp *v.* Brewing Co., 123 Pa. 142. But it seems to be essential that property shall have been transferred when the promise is made. Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470.

[4] See *e. g.* allowing the action, Maxfield *v.* Schwartz, 43 Minn. 221; Lovejoy *v.* Howe, 55 Minn. 353; Ellis *v.* Harrison, 104 Mo. 270; Shamp *v.* Meyer, 20 Neb. 223;

On the same principle the holder of a check has sometimes been given a right against the bank on which the check was drawn.[1] The common argument in favor of such a right is that a check is an equitable assignment of part of the fund in the bank.[2] If it be granted that this is unsound, that a check is in its nature an order, not an assignment, the further argument remains that the bank has promised its depositor to pay the latter's checks and that the holder of a check may sue upon this promise. There seems no valid distinction between such a case and Lawrence *v.* Fox. The bank in effect promises to pay such debtors of the depositor as the latter indicates, upon presentation of a check in proper form. No distinction can be made because the creditor to be paid is indefinite at the time the promise was made. Such is the fact in many cases, and it is rightly regarded as immaterial.[3]

The nature of a creditor's right against one who has promised the debtor to pay the debt is involved in determining when the statute of limitations bars the creditor's action. On principle the creditor must have a claim that has not been barred against the original debtor, and the latter must also have such a claim against the promisor. But courts which allow a direct right to the creditor against the promisor hold that though the creditor's original claim is barred he may nevertheless enforce a claim against the promisor if the statutory period has not run since the debt was assumed.[4]

It is when the rights of the promisee are considered that the difficulties in the American law become apparent. It seems obviously unfair to subject the promisor to suits both by the creditor and the promisee, and on the other hand the doctrine that a pro-

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Merriman *v.* Social Mfg. Co., 12 R. I. 175; Spann *v.* Cochran, 63 Tex. 240; denying the action, Morgan *v.* Randolph-Clowes Co., 73 Conn. 396; Ayres *v.* Gallup, 44 Mich. 13.

[1] Harrison *v.* Wright, 100 Ind. 515, 533; Hawley *v.* Exchange Bank, 97 Ia. 187; Harrison *v.* Simpson, 17 Kan. 508; Chanute Bank *v.* Crowell, 6 Kan. App. 533; Fonner *v.* Smith, 31 Neb. 107. *Conf.* Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82. See Daniel on Negotiable Instruments, 4th ed., § 1637 *seq.*

[2] Ibid.

[3] Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Morgan *v.* Overman Co., 37 Cal. 534; Whitney *v.* Am. Ins. Co., 127 Cal. 464; Williamson Stewart Co. *v.* Seaman, 29 Ill. App. 68; Brenner *v.* Luth, 28 Kan. 581; Bell *v.* Mendenhall, 71 Minn. 330; State *v.* St. Louis & S. F. Ry. Co., 125 Mo. 596, 615; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 56. Many other decisions might be added. Dow *v.* Clark, 7 Gray 198, decided when the Massachusetts court was disposed to restrict the creditor's right of action, is the only contrary decision.

[4] Daniels *v.* Johnson, 129 Cal. 415; Kuhl *v.* Chicago & N. W. R. R., 101 Wis. 42. See also Roberts *v.* Fitzallen, 120 Cal. 482; Robertson *v.* Stuhlmiller, 93 Ia. 326.

misee in a contract made upon good consideration furnished by him cannot sue upon it is hard to reconcile with principle. In cases where the third person is the sole beneficiary the injury to the promisee in depriving him of a right of action is purely technical, because breach of the promise causes him no pecuniary damage; but in the case of a promise to pay a debt the promisee is vitally interested in the performance of the promise. The results reached by the courts are various. In Alabama, in a case of the latter type, the court said: "The promise enured to the benefit of the creditors and *prima facie* they alone can claim payment or sue for the breach of the agreement,"[1] and in Maine, it was said in an early case, "the promisee can recover only nominal damages since the defendant may be liable to the beneficiary;"[2] but this case has recently been overruled.[3] In Nebraska the consignor cannot sue on a bill of lading, though the contract is with him, in the absence of proof that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.[4] In Nevada, also, it was held that a promisee without pecuniary interest in the performance of a promise could not sue upon it.[5] In Rhode Island the rule is the same.[6] In New York if the third person can sue, it seems the promisee cannot. A more complete somersault than the New York court has made on this subject when dealing with mortgages cannot be imagined. In the days before Lawrence *v.* Fox was decided it had been held that the mortgagee, though not entitled to sue directly a grantee who had assumed the mortgage, might be "subrogated" to the right of the mortgagor — the promisee. Now the court holds that the promisee cannot sue, but upon paying the mortgage debt he is entitled to be subrogated to the right of the mortgagee to sue upon this promise.[7] Ohio has recently reached the same con-

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[1] Dimmick *v.* Register, 92 Ala. 458, 460; North Alabama Development Co. *v.* Short, 101 Ala. 333.

[2] Burbank *v.* Gould, 15 Me. 118.

[3] Baldwin *v.* Emery, 89 Me. 496. In Martin *v.* Ætna Ins. Co., 73 Me. 25, 28, it was held in a case of the sole beneficiary type that the promisee might sue as trustee for the beneficiary.

[4] Union Pacific Ry. Co. *v.* Metcalf, 50 Neb. 452. See, *contra*, Snider *v.* Adams Express Co., 77 Mo. 523, where consignor was allowed to recover as trustee for consignee. See 4 Elliott on Railroads, § 1692.

[5] Ferris *v.* Carson Water Co., 16 Nev. 44.

[6] Adams *v.* Union R. R. Co., 21 R. I. 134.

[7] Miller *v.* Winchell, 70 N. Y. 437, 439; Ayers *v.* Dixon, 78 N. Y. 318. For the earlier New York decisions, see *ante*, p. 788, n. 5. In Claflin *v.* Ostrom, 54 N. Y. 581, 584, it was held that the promisee or his assignee might sue upon a pro-

clusion,[1] though it is in conflict with an earlier Ohio decision which was not cited.[2]

The idea behind the cases which deny the promisee a right of action is that by the assent of the third person a novation is created;[3] but as has been already shown, a contract with a debtor to pay his debt, even though the creditor assents, does not amount to a novation.

Whatever the hardship upon the promisor may be in being liable to two persons when he promised but one, most courts have found it the simpler alternative, a recovery by either party being a bar to an action by the other.[4] In mortgage cases especially the promisor may thus find himself in a difficult position between the mortgagee and the promisee, the grantor of the premises. If the promisor fails to keep his promise to pay the debt, he is liable to the promisee to the full amount of the debt;[5] and unless the promise

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mise to assume the debts of a firm, and in Ward *v.* Cowdrey, 51 Hun. 641, affd. 119 N. Y. 614, it was held that a promisee might sue in the absence of proof that the third person knew of or acquiesced in the arrangement. The beneficiary in these cases could not have sued.

[1] Poe *v.* Dixon, 60 Ohio St. 124. Compare Blood *v.* Crew Levick Co., 171 Pa. 334, 337. The court there said: "As to the amount still due and unpaid on the mortgages . . . the plaintiff cannot recover to her own use until she has been compelled to make payment and then only to the extent of payments actually made. An action might be maintained by the holder of the mortgage in the name of the covenantee for his use upon the express covenant to pay contained in the deed; and I see no reason why an action might not be brought by a covenantee to recover damages sustained by reason of the breach."

[2] Wilson *v.* Stilwell, 9 Ohio St. 467. A retiring partner, who had received a promise from the remaining partner that the latter would pay the firm debts was held entitled to sue upon the promise without having first paid the debts himself.

[3] See also Brewer *v.* Dyer, 7 Cush. 337, 341. The promisee "might likewise have a remedy on the contract in case the plaintiff should not elect to adopt it."

[4] Union Mut. L. I. Co. *v.* Hanford, 143 U. S. 187; Steene *v.* Aylesworth, 18 Conn. 244, 252; Tinkler *v.* Swaynie, 71 Ind. 562; Rodenbarger *v.* Bramblett, 78 Ind. 213; Foster *v.* Marsh, 25 Ia. 300; Smith *v.* Smith, 5 Bush 625, 632; Baldwin *v.* Emery, 89 Me. 496; Rogers *v.* Gosnell, 51 Mo. 466, 469; Snider *v.* Adams Express Co., 77 Mo. 523; Beardslee *v.* Morgner, 4 Mo. App. 139, 143; Megher *v.* Stewart, 6 Mo. App. 139, 143; Weinreich *v.* Weinreich, 18 Mo. App. 364, 372; Anthony *v.* German Am. Ins. Co., 48 Mo. App. 65; Am. Nat. Bank *v.* Klock, 58 Mo. App. 335; Gunnell *v.* Emerson, 73 Mo. App. 291 (*conf.* Bethany *v.* Howard, 149 Mo. 504); Strong *v.* Kamm, 13 Oreg. 172; Edmundson *v.* Penny, 1 Barr 334; Hoff's Appeal, 24 Pa. 200; Blood *v.* Crew Levick Co., 171 Pa. 334; Snyder *v.* Summers, 1 Lea 534; Callender *v.* Edmison, 8 S. Dak. 81; Hull *v.* Hayward, 13 S. Dak. 291; Jones *v.* Thomas, 21 Gratt. 96. See also authorities in next note.

[5] Meyer *v.* Hartman, 72 Ill. 442; Stout *v.* Folger, 34 Ia. 71; Furnas *v.* Durgin, 119 Mass. 500; Locke *v.* Homer, 131 Mass. 93; Strohauer *v.* Voltez, 42 Mich. 444; Dorrington *v.* Minnick, 15 Neb. 397; Rawson *v.* Copeland, 2 Sandf. Ch. 251; Rector *v.* Higgins, 48 N. Y. 532; Sage *v.* Truslow, 88 N. Y. 240; Wilson *v.* Stilwell, 9 Ohio St.

can bear the construction of a promise to indemnify against loss, this seems sound. But the recovery of the promisee cannot affect the mortgagee's rights against the property, and if he forecloses the mortgage, the promisor loses the property and is obliged to pay the debt also. The proper relief for the promisor is an application to equity when he is sued by the promisee, for an injunction against the action on terms of payment of the debt to the mortgagee. Equity should grant such an injunction, for it does not injure the promisee, since the terms imposed amount to a decree of specific performance of the promise.[1] It seems also that if the mortgage has been foreclosed and the mortgagee thereby paid and the promisee freed from liability as mortgagor, the promisor should be entitled to an injunction against the collection of any judgment of the promisee against him, or if a judgment has already been collected, to an action on principles of *quasi* contract to recover back the amount collected less costs and any payment or remaining liability of the promisee to the mortgagee.

Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue the new promisor.[2] The

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468; Callender *v.* Edmison, 8 S. Dak. 81; Sedgwick on Damages, § 789; Sutherland on Damages, § 765. And it makes no difference that the promisor has sold the land again. Reed *v.* Paul, 131 Mass. 129. But if the mortgagee has been paid from sale of the land the promisee can recover only nominal damages. Muhlig *v.* Fiske, 131 Mass. 110; Williams *v.* Fowler, 132 Mass. 385. See also Wilson *v.* Bryant, 134 Mass. 291.

[1] Compare Ford *v.* Bell, 35 Ga. 258. In that case the mortgagee sued the mortgagor. The latter having sold the premises to a third party, who had agreed to pay the mortgage, brought a bill in equity joining both the mortgagee and the purchaser, praying that the latter be compelled to pay the debt. The bill was sustained. See also Wilson *v.* Stilwell, 9 Ohio St. 467.

[2] Henry *v.* Murphy, 54 Ala. 246; Hall *v.* Alford, 49 S. W. Rep. 444 (Ky.); Floyd *v.* Ort, 20 Kan. 162; Searing *v.* Benton, 41 Kan. 758 (compare Kansas Pac. Ry. Co. *v.* Hopkins, 18 Kan. 499, and Plano Mfg. Co. *v.* Burrows, 40 Kan. 361. In the latter case the court held that "no one has the right to take the objection that the old debt is not extinguished, but the old debtor, and probably even he would not have such right"); Bohanan *v.* Pope, 42 Me. 93; Brewer *v.* Dyer, 7 Cush. 339; Warren *v.* Batchelder, 16 N. H. 580; Wood *v.* Moriarty, 15 R. I. 518, 522; Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556.

In no case, however, has a court held that a mortgagee by seeking to recover against one who had assumed a mortgage released the mortgagor; and in Rouse *v.*

more common doctrine, however, allows the creditor a right both against the original debtor and the new promisor.[1]

Another question concerns the admissibility of certain defences by the promisor. When sued by the third person, the promisor may rely on facts showing that the promisee could not enforce the contract. Is the third person barred because the promisee would be? It is necessary to observe some distinctions here. The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract no rights can arise in favor of any one. Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise. If that is in terms conditional, no one can acquire any rights under it unless the condition happens.[2] Further, if there is a contract valid at law, but subject to some equitable defence — as fraud,[3]

Bartholomew, 51 Kan. 425, the Kansas court held the mortgagor was not released though the decision is inconsistent in principle with the previous decisions of the court as to other debts.

In Young *v.* Hawkins, 74 Ala. 370, it was held that recovering judgment against the original debtor in ignorance that a new promisor had agreed to pay the debt did not bar a subsequent recovery against the latter. To make a binding election it was said knowledge of the facts is essential.

[1] Hopkinson *v.* Warner, 109 Cal. 133; South Side Assoc. *v.* Cutler Co., 64 Ind. 560; Davis *v.* Hardy, 76 Ind. 272; Rodenbarger *v.* Bramblett, 78 Ind. 213; Stanton *v.* Kenrick, 135 Ind. 382, 389; Rothermel *v.* Bell & Zoller Co., 79 Ill. App. 667; Wickham *v.* Hyde Park Assoc., 80 Ill. App. 523; Rouse *v.* Bartholomew, 51 Kan. 425; Davis *v.* Nat. Bank of Commerce, 45 Neb. 589; Fischer *v.* Hope Mut. Life Ins. Co., 69 N. Y. 161; Poe *v.* Dixon, 60 Ohio St. 124, 129; Feldman *v.* McGuire, 34 Oreg. 309, 313.

[2] Russell *v.* Western Union Tel. Co., 57 Kan. 230; Fenn *v.* Union Co., 48 La. Ann. 541; Gill *v.* Weller, 52 Md. 8. But see Orman *v.* North Alabama Co., 53 Fed. Rep. 469, 55 Fed. Rep. 18; East *v.* New Orleans Ins. Assoc., 76 Miss. 697; Oakland Ins. Co. *v.* Bank of Commerce, 47 Neb. 717. In the first case the person to whom a telegram was sent, who was treated as the beneficiary of the contract with the telegraph company, was held subject to the requirement in that contract that the claim must be presented within 60 days. In the last two cases a mortgagee was allowed to sue on policies of insurance taken out by the mortgagor "loss payable to mortgagee" though the mortgagor had acted in such a way as would avoid the policy as to him.

[3] Green *v.* Turner, 80 Fed. Rep. 41; 86 Fed. Rep. 837; Benedict *v.* Hunt, 32 Ia. 27; Maxfield *v.* Schwartz, 45 Minn. 150; Ellis *v.* Harrison, 104 Mo. 270, 278; Saunders *v.* McClintock, 46 Mo. App. 216; American Nat. Bank *v.* Klock, 58 Mo. App. 335; Wise *v.* Fuller, 29 N. J. Eq. 257; Arnold *v.* Nichols, 64 N. Y. 117; Moore *v.* Ryder, 65 N. Y. 438; Trimble *v.* Strother, 25 Ohio St. 378; Osborne *v.* Cabell, 77 Va. 462. Fitzgerald *v.* Barker, 96 Mo. 661, and Klein *v.* Isaacs, 8 Mo. App. 568, to the contrary must be regarded either as overruled or distinguished on the ground that the plaintiff bought the note, payment of which was assumed, on the faith of the defendant's promise to pay it.

mistake,[1] or failure of consideration[2] — the defence may be set up against the third person. If the case is a promise to pay a debt or discharge a duty of the promisee, the rights of the third person can only be derived through the promisee, and whatever defence affects the latter affects the creditor. In the case of a promise for the sole benefit of a third person, the beneficiary may indeed be regarded as having a direct right, but he is in the position of a donee. It is no more equitable for a sole beneficiary, though himself innocent to try to enforce a promise procured by the fraud of another, than for the donee of trust property to insist on his legal title as against the *cestui que trust.*

A more difficult case arises where the defence does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter promise made by him, or discharge by the promisee by release or rescission. The defence of non-performance should be available against the third person whether he is a sole beneficiary or a creditor of the promisee. The defence is frequently called failure of consideration. This is technically inaccurate, since the consideration for the promise was the counter promise, and that has not failed; but as the substantial matter the parties had in mind was the performance of the promises the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had.[3]

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[1] Episcopal Mission *v.* Brown, 158 U. S. 222; Jones *v.* Higgins, 80 Ky. 409; Bogart *v.* Phillips, 112 Mich. 697; Rogers *v.* Castle, 51 Minn. 428; Gold *v.* Ogden, 61 Minn. 88; Bull *v.* Titsworth, 29 N. J. Eq. 73; Stevens Inst. *v.* Sheridan, 30 N. J. Eq. 23; O'Neill *v.* Clark, 33 N. J. Eq. 444; Green *v.* Stone, 54 N. J. Eq. 387; Crow *v.* Lewis, 95 N. Y. 423; Wheat *v.* Rice, 97 N. Y. 296.

[2] Clay *v.* Woodrum, 45 Kan. 116; Amonett *v.* Montague, 75 Mo. 43; Judson *v.* Dada, 79 N. Y. 373, 379; Osborne *v.* Cabell, 77 Va. 462.

Several decisions present the case of a purchaser with warranty of land subject to a mortgage, who has been evicted from the premises and is thereafter sued by the holder of the mortgage. The defence was held good in Dunning *v.* Leavitt, 85 N. Y. 30; Crow *v.* Lewis, 95 N. Y. 423; Gifford *v.* Father Matthew Society, 104 N. Y. 139. But see *contra*, Blood *v.* Crew Levick Co., 177 Pa. 606; Hayden *v.* Snow, 9 Biss. 511; 14 Fed. Rep. 70; s. c. *sub nom.* Hayden *v.* Devery, 3 Fed. Rep. 782. In the last case the decision was based on the fact that the plaintiff was a purchaser for value of the mortgage note after the defendant had assumed the mortgage. See also Knapp *v.* Connecticut Mut. L. I. Co., 85 Fed. Rep. 329; Connecticut Mut. L. I. Co. *v.* Knapp, 62 Minn. 405.

[3] Episcopal Mission *v.* Brown, 158 U. S. 222; Pugh *v.* Barnes, 108 Ala. 167; Stuyvesant *v.* Western Mortgage Co., 22 Col. 28, 33; Miller *v.* Hughes, 95 Ia. 223;

The commonest defence, that of discharge by rescission or release, is different. In the case of a sole beneficiary it is like the attempted revocation of a gift. The promisor for good consideration has given the beneficiary a right. Later he seeks to take it away by procuring the extinction of the promise. If it be admitted that the beneficiary has a direct right of his own, it ought not to be extinguished without his consent. The only question can be, when does the beneficiary's right arise — when the promise for his benefit was made or when he was notified of it or assented to it? for unless a right has vested in the beneficiary before the rescission or release he cannot object. The question is analogous to that arising upon a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee there seems no reason why his assent should not be presumed, unless and until he expresses dissent.[1] According to this view the sole beneficiary acquires a right immediately upon the making of the contract and any subsequent rescission is ineffectual. There is weighty authority in support of this view;[2] but in most jurisdictions the distinction has not been clearly stated in the decisions between cases of sole beneficiary and cases of debtor and creditor. Most of the cases have been of the latter sort, and it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a rescission or release is operative.[3] In theory, however, in a case of debtor and creditor

see also Willard *v.* Wood, 164 U. S. 502, 521; Loeb *v.* Willis, 100 N. Y. 231. But see apparently *contra* Cress *v.* Blodgett, 64 Mo. 449; Commercial Bank *v.* Wood, 7 W. & S. 89; Fulmer *v.* Wightman, 87 Wis. 573. In Missouri and Nebraska it has been held that a surety for the promise of a contractor to a district or municipality to pay for his labor and materials is liable to workmen and material men in spite of the fact that the promisee, the district or municipality, has paid the contractor during the progress of the work to an amount not allowed by the contract. The Missouri decision relies on the fact that the plaintiffs had become creditors on the faith of the defendant's suretyship before the promisee had committed any breach of duty. The Nebraska decisions make no such distinction. School District *v.* Livers, 147 Mo. 580; Doll *v.* Crume, 41 Neb. 655; Kaufmann *v.* Cooper, 46 Neb. 644; King *v.* Murphy, 49 Neb. 670.

[1] Ames, Cas. Trusts, 2d ed., 232–234.

[2] Henderson *v.* McDonald, 84 Ind. 149, and Waterman *v.* Morgan, 114 Ind. 237; Thompson *v.* Gordon, 3 Strobh. 196. See also Knowles *v.* Erwin, 43 Hun 150, affd. 124 N. Y. 623. A few cases of the debtor and creditor type seem to hold a similar doctrine. Starbird *v.* Cranston, 24 Col. 20; Bay *v.* Williams, 112 Ill. 91; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Rogers *v.* Gosnell, 58 Mo. 589.

The almost universal doctrine that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently is in accord. The numerous cases are collected in 3 Am. & Eng. Cyc., 2d ed., 980.

[3] Biddel *v.* Brizzolara, 64 Cal. 354; Merrick *v.* Giddings, 1 Mackey (D. C.) 394;

the situation is very different from that arising where the third person is a sole beneficiary. The creditor's right is purely derivative, and if the debtor no longer has a right against the promisor the creditor can have none. In one respect only has the creditor any right to object to a rescission or release. The promise to the debtor to pay the debt is a valuable right belonging to the debtor. Like his other property the debtor has no right to give it away if he thereby deprives himself of sufficient means to pay his debts. Even though insolvent, however, he has a right to change the form of his assets. Consequently to a rescission or release for adequate consideration paid to the debtor, the creditor should never have a right to object. A release or rescission by an insolvent debtor, without any consideration, or without adequate consideration, however, is a fraudulent conveyance. It is a gift of property by one whose circumstances do not justify him in giving, and the creditor may disregard the gift. Here, too, the knowledge of the promise by the third person or his assent thereto should make no difference. A promise to a debtor to pay his debt is a valuable asset whether the creditor knows of it or not, and the debtor, if insolvent, has no right to dispose of it without receiving an adequate price for it.[1]

Another kind of defence to a promise to pay a debt has given rise to considerable litigation. May the promisor set up that

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Durham *v.* Bischof, 47 Ind. 211; Carnahan *v.* Tousey, 93 Ind. 561; Smith *v.* Flack, 95 Ind. 116, 120; Gilbert *v.* Sanderson, 56 Ia. 349; Cohrt *v.* Kock, 56 Ia. 658; Seiffert Lumber Co. *v.* Hartwell, 94 Ia. 576, 582; Dodge's Adm. *v.* Moss, 82 Ky. 441; Mitchell *v.* Cooley, 5 Rob. 243; Cucullu *v.* Walker, 16 La. Ann. 198; Gifford *v.* Corrigan, 117 N. Y. 257; Seaman *v.* Hasbrouck, 35 Barb. 151; Holder *v.* Nat. Bank, 9 Hun 108, affd. 73 N. Y. 599; Wilson *v.* Stilwell, 14 Ohio St. 464; Trimble *v.* Strother, 25 Ohio St. 378; Brewer *v.* Maurer, 38 Ohio St. 543; Emmitt *v.* Brophy, 42 Ohio St. 82; McCown *v.* Schrimpf, 21 Tex. 22; Huffman *v.* Western Mortgage Co., 13 Tex. Civ. App. 169; Clark *v.* Fisk, 9 Utah 94; Bassett *v.* Hughes, 43 Wis. 319.

What is required in the way of assent or acting upon the promise is not defined. Doubtless in many jurisdictions if the third person had knowledge of the promise and made no objection he would be regarded as assenting. But in Crowell *v.* Currier, 27 N. J. Eq. 152 (s. c. on appeal *sub. nom.* Crowell *v.* Hospital, 27 N. J. Eq. 650), it was held that rescission was permissible because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission; and in Wood *v.* Moriarty, 16 R. I. 201, a release by the promisee was held effectual, though the creditors had made a demand upon the promisor for the money, because the creditors "did not do or say anything inconsistent with their continuing to look to T (the original debtor) for the debt."

[1] This analysis finds some support in the cases of Trustees *v.* Anderson, 30 N. J. Eq. 366; Youngs *v.* Trustees, 31 N. J. Eq. 290, and Willard *v.* Worsham, 76 Va. 392, where the validity of a release by the mortgagor of one who had purchased the equity of redemption from him and assumed the mortgage was made to depend on the solvency of the mortgagor.

the debtor did not owe the debt or that it was an illegal debt? The true answer to this question depends upon the true meaning in fact of the promise rather than upon any rule of law. If the promisor's agreement is to be construed as a promise to discharge whatever liability the promisee is under, the promisor must certainly be allowed to show that the promisee was under no liability. Thus one who in return for an assignment of property assumed all the grantor's debts would certainly be allowed to dispute the validity of any debt. On the other hand, if the promise means that the promisor agrees to pay a sum of money to A, to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted to that amount or at all. The promisee has decided that question himself. Where the promise is to pay a specific debt, for example to assume a specific mortgage, this construction will generally be the true one. Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury [1] or other defences [2] of which the debtor might have availed himself.

In dealing with any of these defences it is obvious that all three parties should have an opportunity of litigating the question since all are interested in it, and it is desirable to have all concluded by the judgment. If a creditor who sues the promisor and is met by the defence of fraud or mistake in the contract nevertheless prevails, but being unable to collect his judgment sues the original debtor, as he would be allowed to do in many jurisdictions, clearly

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[1] Millington *v.* Hill, 47 Ark. 301; People's Bank *v.* Collins, 27 Conn. 142; Henderson *v.* Bellew, 45 Ill. 322; Valentine *v.* Fish, 45 Ill. 462; Essley *v.* Sloan, 16 Ill. App. 63; Flanders *v.* Doyle, 16 Ill. App. 508; Cleaver *v.* Burcky, 17 Ill. App. 92; Stephens *v.* Muir, 8 Ind. 352; Hough *v.* Hersey, 36 Mo. 181; Log Cabin Assoc. *v.* Gross, 71 Md. 456; Scanlan *v.* Grimmer, 71 Minn. 351; Cramer *v.* Lepper, 26 Ohio St. 59; Jones *v.* Insurance Co., 40 Ohio St. 583; Spaulding *v.* Davis, 51 Vt. 77; Conover *v.* Hobart, 24 N. J. Eq. 120; Post *v.* Dart, 8 Paige 639; Cole *v.* Savage, 10 Paige 583; Root *v.* Wright, 21 Hun 344; Sands *v.* Church, 6 N. Y. 347; Hartley *v.* Harrison, 24 N. Y. 170; Ritter *v.* Phillips, 53 N. Y. 586 (payment). But see Knickerbocker Life Ins. Co. *v.* Nelson, 78 N. Y. 137.

[2] Pope *v.* Porter, 33 Fed. Rep. 7 (informal execution); Kennedy *v.* Brown, 61 Ala. 296 (coverture); Gowans *v.* Pierce, 57 Kan. 180 (unauthorized signature to note); Cox *v.* Hoxie, 115 Mass. 120 (erroneous amount); Comstock *v.* Smith, 26 Mich. 306 (coverture); Miller *v.* Thompson, 34 Mich. 10 (invalid execution); Crawford *v.* Edwards, 33 Mich. 354 (failure of consideration); Lee *v.* Newman, 55 Miss. 365 (invalidity); Johnson *v.* Parmely, 14 Hun 398 (payment); Ferris *v.* Cranford, 2 Den. 595 (payment); Horton *v.* Davis, 26 N. Y. 495 (want of record); Freeman *v.* Auld, 44 N. Y. 50 (failure of consideration); Parkinson *v.* Sherman, 74 N. Y. 88 (failure of consideration); Bennett *v.* Bates, 94 N. Y. 354, 370 (invalidity of mortgage). But see Goodman *v.* Randall, 44 Conn. 321.

the debtor cannot be concluded by the judgment in the first case and the creditor must try the same question again and perhaps with a different result. This is another illustration of the necessity of all three parties being joined in the litigation.[1]

None of the earlier cases which allowed a right of action to one who was not a party to the contract related to contracts under seal, and where statutes have not taken away the importance of the distinction between sealed and parol contracts the rule that one who is not a party to a contract under seal cannot sue upon it is still applied to contracts to benefit or pay a debt to a third person.[2] But in some states the rules of the common law distinguishing contracts under seal from other written contracts have been abolished or diminished, so that it is not surprising that the distinction as to the right of a third person to sue has also been disregarded.[3]

It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance. A typical case

[1] In Green *v.* Stone, 54 N. J. Eq. 387, the court held that the defence that the clause assuming payment of a mortgage was inserted in a deed by mistake must be asserted by a cross bill to which the promisee must be made a party.

[2] Hendricks *v.* Lindsay, 93 U. S. 143; Willard *v.* Wood, 135 U. S. 311, 313; 152 U. S. 502; Douglass *v.* Branch Bank, 19 Ala. 659; Hunter *v.* Wilson, 21 Fla. 250, 252; Gunter *v.* Mooney, 72 Ga. 205; Moore *v.* House, 64 Ill. 162; Gautzert *v.* Hoge, 73 Ill. 30; Harms *v.* McCormick, 132 Ill. 104, 109 (now changed by statute); Hinkley *v.* Fowler, 15 Me. 285; Farmington *v.* Hobart, 74 Me. 416; Seigman *v.* Hoffacker, 57 Md. 321; Montague *v.* Smith, 13 Mass. 396; Millard *v.* Baldwin, 3 Gray 484; Robb *v.* Mudge, 14 Gray 534, 538; Flynn *v.* North American Life Ins. Co., 115 Mass. 449; Lee *v.* Newman, 55 Miss. 365, 374; How *v.* How, 1 N. H. 49; Crowell *v.* Currier, 27 N. J. Eq. 152; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141, 146; Cocks *v.* Varney, 45 N. J. Eq. 72; Strohecker *v.* Grant, 16 S. & R. 237; De Bollé *v.* Pennsylvania Ins. Co., 4 Whart. 68; Mississippi R. R. Co. *v.* Southern Assoc., 8 Phila. 107; McAlister *v.* Marberry, 4 Humph. 426; Fairchild *v.* North Eastern Assoc., 51 Vt. 613; Jones *v.* Thomas, 21 Gratt. 96, 101 (now changed by statute); McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

[3] Central Trust Co. *v.* Berwind-White Co., 95 Fed. Rep. 391; Starbird *v.* Cranston, 24 Col. 20; Webster *v.* Fleming, 178 Ill. 140; Harts *v.* Emery, 184 Ill. 560; Robinson *v.* Holmes, 75 Ill. App. 203; Am. Splane Co. *v.* Barber, 91 Ill. App. 359; 1 Bush 48; Jefferson *v.* Asch, 53 Minn. 446; Rogers *v.* Gosnell, 51 Mo. 466; 58 Mo. 589; Van Schaick *v.* Railroad, 38 N. Y. 346; Coster *v.* Albany, 43 N. Y. 399; Riordan *v.* First Church, 26 N. Y. Supp. 38; Emmitt *v.* Brophy, 42 Ohio St. 82; Hughes *v.* Oregon Co., 11 Oreg. 437; McDowell *v.* Laev, 35 Wis. 181; Basset *v.* Hughes, 43 Wis. 319; Houghton *v.* Milburn, 54 Wis. 554; Stites *v.* Thompson, 98 Wis. 329, 331. A third person was allowed to enforce a promise under seal also in the following cases, but the point was not discussed: South Side Assoc. *v.* Cutler Co., 64 Ind. 560; Anthony *v.* Herman, 14 Kan. 494; Brenner *v.* Luth, 28 Kan. 581. See also Va. Code, § 2415; Newberry Land Co. *v.* Newberry, 95 Va. 111.

is where A promises B to pay him money for his expenses. A creditor of B is not generally allowed to sue A.[1] It is obvious that such a creditor's right can properly be only a derivative one. As the obligation is to pay money to the debtor, there seems no reason why garnishment proceedings are not appropriate.

A different case arises where the promise is to indemnify against damages. Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right.[2] Nor can the promisee sue for the benefit of persons claiming damages.[3]

A third person's benefit under a contract may be still more incidental. In a recent case the failure of the grantee of land to keep his promise to the grantor to pay a mortgage, resulted in a loss to the plaintiff of an interest in the land when the mortgagee foreclosed the mortgage. The New York court rightly refused relief.[4] The contract was not made even partially for the plaintiff's benefit, and as the promisee was under no obligation to the plaintiff it is not possible to work out an indirect right.[5]

A Louisiana case[6] furnishes another illustration. A number of hatters agreed to close their shops on Sundays, and for any breach it was agreed that the offender should pay $100 to a specified charitable society. It was held that the society could not recover. The object of the contract was not to benefit the plaintiff, but to enforce performance of a promise by the imposition of a penalty.

Samuel Williston.

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[1] Cragin *v.* Lovell, 109 U. S. 194, 199; Thomas Mfg. Co. *v.* Prather, 65 Ark. 27; Burton *v.* Larkin, 36 Kan. 246. See also Jackson Iron Co. *v.* Negaunee Concentrating Co., 65 Fed. Rep. 298; Hill *v.* Omaha, etc., R. R. Co., 82 Mo. App. 188. But see *contra* Rothwell *v.* Skinker, 84 Mo. App. 169; Houghton *v.* Milburn, 54 Wis. 554. And where an insurance company had reinsured its risks, a policy holder was allowed to sue the reinsuring company directly in Glen *v.* Hope Mut. Life Ins. Co., 56 N. Y. 379; Fischer *v.* Hope Mut. Life Ins. Co., 69 N. Y. 161; Johannes *v.* Phenix Ins. Co., 66 Wis. 50.

[2] Hill *v.* Omaha, etc., R. R. Co., 82 Mo. App. 188; French *v.* Vix, 143 N. Y. 90; Embler *v.* Hartford Ins. Co., 158 N. Y. 431; Mansfield *v.* Mayor of New York, 165 N. Y. 208

[3] New Haven *v.* Railroad, 62 Conn. 253.

[4] Durnherr *v.* Rau, 135 N. Y. 219. See also Pearson *v.* Bailey, 62 N. E. Rep. 265 (Mass.).

[5] See also Constable *v.* National Steamship Co., 154 U. S. 51; Hennessy *v.* Bond, 77 Fed. Rep. 403, 405.

[6] New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338.

NOTE I.

Recovery allowed by a sole beneficiary in an action at law (insurance cases are not included).

ARKANSAS. Rogers *v.* Galloway Female College, 64 Ark. 627.

GEORGIA. Wilson *v.* First Presbyterian Church, 56 Ga. 554. See also Code, § 3664.

ILLINOIS. Lawrence *v.* Oglesby, 178 Ill. 122.

INDIANA. Allen *v.* Davison, 16 Ind. 416; Beals *v.* Beals, 20 Ind. 163; Marlett *v.* Wilson, 30 Ind. 240; Miller *v.* Billingsly, 41 Ind. 489; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Stevens *v.* Flannagan, 131 Ind. 122; Ferris *v.* American Brewing Co., 155 Ind. 539. Except for the Code the plaintiff would have to sue in equity.

KANSAS. Strong *v.* Marcy, 33 Kan. 109.

KENTUCKY. Clarke *v.* McFarland's Exec., 5 Dana 45; Smith *v.* Smith, 5 Bush 625; Benge *v.* Hiatt's Adm. 82 Ky. 666; Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340. See also McGuire *v.* McGuire, 11 Bush 142; Mercer *v.* Mercer's Adm., 87 Ky. 30. Except for the Code plaintiff would have to sue in equity.

LOUISIANA. Civil Code, Arts. 1884, 1896.

MARYLAND. Owings *v.* Owings, 1 H. & G. 484, 491.

MASSACHUSETTS. Felton *v.* Dickinson, 10 Mass. 287 (overruled by Terry *v.* Brightman, 132 Mass. 318; Marston *v.* Bigelow, 150 Mass. 45). See also Felch *v.* Taylor, 13 Pick. 133; Bacon *v.* Woodward, 12 Gray 376, 382; Prentice *v.* Brimhall, 123 Mass. 291.

MISSOURI. St. Louis *v.* Von Phul, 133 Mo. 561; Devers *v.* Howard, 144 Mo. 671; Crone *v.* Stinde, 156 Mo. 262; Weinreich *v.* Weinreich, 18 Mo. App. 364; Markel *v.* W. U. Tel. Co., 19 Mo. App. 80; Glencoe Lime Co. *v.* Wind, 86 Mo. App. 163. But see Phoenix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304.

NEBRASKA. Hale *v.* Ripp, 32 Neb. 259; Sample *v.* Hale, 34 Neb. 220; Lyman *v.* Lincoln, 38 Neb. 794; Doll *v.* Crume, 41 Neb. 655; Korsmeyer Co. *v.* McClay, 43 Neb. 649; Chicago, etc., R. R. Co. *v.* Bell, 44 Neb. 44; Kaufmann *v.* Cooper, 46 Neb. 644; Hickman *v.* Layne, 47 Neb. 177, 180; Fitzgerald *v.* McClay, 47 Neb. 816; King *v.* Murphy, 49 Neb. 670; Rohman *v.* Gaiser, 53 Neb. 474; Pickle Marble Co. *v.* McClay, 54 Neb. 661. But see Eaton *v.* Fairbury Water Works Co., 37 Neb. 546.

NEVADA. See Ferris *v.* Carson Water Co., 16 Nev. 44.

NEW JERSEY. Rue *v.* Meirs, 43 N. J. Eq. 377, 384; Whitehead *v.* Burgess, 61 N. J. L. 75.

NEW YORK. Schermerhorn *v.* Vanderheyden, 1 Johns. 139, 140; Glen *v.* Hope Mutual L. I. Co., 56 N. Y. 379; Little *v.* Banks, 85 N. Y. 281; Todd *v.* Weber, 95 N. Y. 181; Rector *v.* Teed, 44 Hun 349, 120 N. Y. 583; Buchanan *v.* Tilden, 158 N. Y. 109; Roberts *v.* Cobb, 31 Hun 150; Knowles *v.* Erwin, 43 Hun 150; affd. 124 N. Y. 633; Whitcomb *v.* Whitcomb, 92 Hun 443; Babcock *v.* Chase, 92 Hun 264; Luce *v.* Gray, 92 Hun 599. But see *contra* Lorillard *v.* Clyde, 122 N. Y. 498; Townsend *v.* Rackham, 143 N. Y. 576; Sullivan *v.* Sullivan, 161 N. Y. 554; Wainwright *v.* Queen's County Water Co., 78 Hun 146; Coleman *v.* Hiler, 85 Hun 547; Buffalo Cement Co. *v.* McNaughton, 90 Hun 74, affd. 156 N. Y. 702, re-argument denied, 157 N. Y. 703; Glens Falls Gas Light Co. *v.* Van Vranken, 11 N. Y. App. Div. 420.

OHIO. Flickinger *v.* Saum, 40 Ohio St. 591, 601; Irwin *v.* Lombard Univ., 56 Ohio St. 9, 20.

PENNSYLVANIA. Strohecker *v.* Grant, 16 S. & R. 237, 241, *semble;* Ayers Appeal, 28 Pa. 179; Hostetter *v.* Hollinger, 117 Pa. 606. But see *contra* Edmundson *v.* Penny, 1 Barr 334; Guthrie *v.* Kerr, 85 Pa. 303.

RHODE ISLAND. Adams *v.* Union R. R. Co., 21 R. I. 134. But see *contra* Wilbur *v.* Wilbur, 17 R. I. 295.

SOUTH CAROLINA. Thompson *v.* Gordon, 3 Strobh. 196.

UTAH. See Montgomery *v.* Rief, 15 Utah 495.

VERMONT. Hodges *v.* Phelps, 65 Vt. 303. But see *contra* Crampton *v.* Ballard, 10 Vt. 251; Hall *v.* Huntoon, 17 Vt. 244; Fugure *v.* Mut. Soc. of St. Joseph, 46 Vt. 362.

VIRGINIA. Taliaferro *v.* Day, 82 Va. 79; Code of 1887, § 2415. But see *contra* Ross *v.* Milne, 12 Leigh 204; also Newberry Land Co. *v.* Newberry, 95 Va. 111.

WEST VIRGINIA. Johnson *v.* McClung, 26 W. Va. 659, 670.

WISCONSIN. Grant *v.* Diebold Safe Co., 77 Wis. 72.

UNITED STATES. Nat. Bank *v.* Grand Lodge, 98 U. S. 143. *Conf.* Constable *v.* National Steamship Co., 154 U. S. 51; *conf.* Sayward *v.* Dexter, 72 Fed. Rep. 758; U. S. *v.* National Surety Co., 92 Fed. Rep. 549; Brown & Haywood Co. *v.* Ligon, 92 Fed. Rep. 851.

NOTE II.

Action at law allowed against one who promises to pay the debt of another (mortgage cases are not included).

ALABAMA. Huckabee *v.* May, 14 Ala. 263; Hoyt *v.* Murphy, 18 Ala. 316; Mason *v.* Hall, 30 Ala. 599; Henry *v.* Murphy, 54 Ala. 246; Young *v.* Hawkins, 74 Ala. 370; Dimmick *v.* Register, 92 Ala. 458; North Ala. Development Co. *v.* Short, 101 Ala. 333; Potts *v.* First Nat. Bank, 102 Ala. 286.

ARKANSAS. Chamblee *v.* McKenzie, 31 Ark. 155; Talbot *v.* Wilkins, 31 Ark. 411; Hecht *v.* Caughron, 46 Ark. 132; Ringo *v.* Wing, 49 Ark. 457, 464; Benjamin *v.* Birmingham, 50 Ark. 433. But see *contra* Hicks *v.* Wyatt, 23 Ark. 55, and *conf.* Thomas Mfg. Co. *v.* Prather, 65 Ark. 27.

CALIFORNIA. Lewis *v.* Covelland, 21 Cal. 189; Morgan *v.* Overman Co., 37 Cal. 534; Malone *v.* Crescent Co., 77 Cal. 38; Smith *v.* Los Angeles, etc., Ry. Co., 98 Cal. 210; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Whitney *v.* Am. Ins. Co., 127 Cal. 464 (overruling McLaren *v.* Hutchinson, 18 Cal. 80, *contra*).

COLORADO. Lehow *v.* Simonton, 3 Col. 346; Green *v.* Morrison, 5 Col. 18; Starbird *v.* Cranston, 24 Col. 20; Wilson *v.* Lunt, 11 Col. App. 56.

FLORIDA. Hunter *v.* Wilson, 21 Fla. 250; Wright *v.* Terry, 23 Fla. 160.

GEORGIA. Ford *v.* Finney, 35 Ga. 258, 261 (*semble*). See also Code, § 3664.

ILLINOIS. Eddy *v.* Roberts, 17 Ill. 505; Brown *v.* Strait, 19 Ill. 88; Briston *v.* Lane, 21 Ill. 194; Rabberman *v.* Niskamp, 54 Ill. 179; Wilson *v.* Bevans, 58 Ill. 232; Beasley *v.* Webster, 64 Ill. 458; Steele *v.* Clark, 77 Ill. 471; Snell *v.* Ives, 85 Ill. 279; Shober Co. *v.* Kerting, 107 Ill. 344; Schmidt *v.* Glade, 126 Ill. 485; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Mathers *v.* Carter, 7 Ill. App. 225; Struble *v.* Hake, 14 Ill. App. 546; Boals *v.* Nixon, 26 Ill. App. 517; Williamson-Stewart Co. *v.* Seaman, 29 Ill. App. 68; McCasland *v.* Doorley, 47 Ill. App. 513; Rothermel *v.* Bell & Zoller Co., 79 Ill. App. 667; Kee *v.* Cahill, 86 Ill. App. 561; Am. Splane Co. *v.* Barber, 91 Ill. App. 359.

INDIANA. Cross *v.* Truesdale, 28 Ind. 44; Davis *v.* Calloway, 30 Ind. 112; Haggerty *v.* Johnston, 48 Ind. 41; Campbell *v.* Patterson, 58 Ind. 66; Loeb *v.* Weis, 64 Ind. 285; South Side Planing Mill Assoc. *v.* Cutler, etc., Co., 64 Ind. 560; Rhodes *v.* Matthews, 67 Ind. 131; Fisher *v.* Wilmoth, 68 Ind. 449; Clodfelter *v.* Hulett, 72 Ind. 137; Medsker *v.* Richardson, 72 Ind. 323; Hendricks *v.* Frank, 86 Ind. 278; Harrison *v.* Wright, 100 Ind. 515, 533; Warren *v.* Farmer, 100 Ind. 593; Wolke *v.* Fleming, 103 Ind. 105; Redelsheimer *v.* Miller, 107 Ind. 485; Leake *v.* Ball, 116 Ind. 214; Boruff *v.* Hudson, 138 Ind. 280. The early Indiana cases before the enactment of the code allowed relief only in equity. Salmon *v.* Brown, 6 Blackf. 347; Farlow *v.*

Kemp, 7 Blackf. 544; Britzell *v.* Fryberger, 2 Ind. 176; Conklin *v.* Smith, 2 Ind. 107, 109; Bird *v.* Lanius, 7 Ind. 615, 618.

IOWA. Johnson *v.* Knapp, 36 Ia. 616; Blair Co. *v.* Walker, 39 Ia. 406; Gilbert *v.* Sanderson, 56 Ia. 349; Poole *v.* Hintrager, 60 Ia. 180; Clinton Nat. Bank *v.* Studemann, 74 Ia. 104; Knott *v.* Dubuque, etc., Ry. Co., 84 Ia. 462; First Nat. Bank *v.* Pipestone, 92 Ia. 530; Hawley *v.* Exchange Bank, 97 Ia. 187.

KANSAS. Harrison *v.* Simpson, 17 Kan. 508; Kansas Pac. Ry. Co. *v.* Hopkins, 18 Kan. 494; Floyd *v.* Ort, 20 Kan. 162; Alliance Mut. L. Ass. Soc. *v.* Welch, 26 Kan. 632, 641; Brenner *v.* Luth, 28 Kan. 581; West *v.* W. U. Tel. Co., 39 Kan. 93; Manufacturing Co. *v.* Burrows, 40 Kan. 361; Mumper *v.* Kelley, 43 Kan. 256; Howell *v.* Hough, 46 Kan. 152; Hardesty *v.* Cox, 53 Kan. 618.

KENTUCKY. Garvin *v.* Mobley, 1 Bush. 548; Dodge's Adm. *v.* Moss, 82 Ky. 441. But see Hall *v.* Alford, 49 S. W. Rep. 444.

LOUISIANA. Mayor *v.* Bailey, 5 Mart. 321; Marigny *v.* Remy, 3 Mart. (N. S.) 607; Cucullu *v.* Walker, 16 La. Ann. 198. See also Civil Code, Arts. 1884, 1896.

MAINE. Burbank *v.* Gould, 15 Me. 118; Hinkley *v.* Fowler, 15 Me. 285; Bohanan *v.* Pope, 42 Me. 93; Coffin *v.* Bradbury, 89 Me. 476; Baldwin *v.* Emery, 89 Me. 496, 498.

MARYLAND. Small *v.* Schaefer, 24 Md. 143; Seigman *v.* Hoffacker, 57 Md. 321, 325. But see *contra* Hand *v.* Evans Marble Co., 88 Md. 226.

MASSACHUSETTS. Arnold *v.* Lyman, 17 Mass. 400: Carnegie *v.* Morrison, 2 Met. 381; Fitch *v.* Chandler, 4 Cush. 254; Brewer *v.* Dyer, 7 Cush. 337; Putnam *v.* Field, 103 Mass. 556, overruled by later decisions *contra;* Flint *v.* Pierce, 99 Mass. 68; Exchange Bank *v.* Rice, 107 Mass. 37; Rogers *v.* Union Stone Co., 130 Mass. 581; Aigen *v.* Boston & Me. R. R., 132 Mass. 423; Morrill *v.* Allen, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410; White *v.* Mt. Pleasant Mills, 172 Mass. 462.

MINNESOTA. Sanders *v.* Clason, 13 Minn. 379; Hawley *v.* Wilkinson, 18 Minn. 527; Jordan *v.* White, 20 Minn. 91; Sullivan *v.* Murphy, 23 Minn. 6; Maxfield *v.* Schwartz, 43 Minn. 221; Lovejoy *v.* Howe, 55 Minn. 353; Sonstiby *v.* Keeley, 7 Fed. Rep. 447. But see Bell *v.* Mendenhall, 71 Minn. 331.

MISSISSIPPI. Sweatman *v.* Parker, 49 Miss. 19, 30.

MISSOURI. Bank of Mo. *v.* Benoist, 10 Mo. 519; Robbins *v.* Ayres, 10 Mo. 538; Carl *v.* Riggs, 12 Mo. 430; Meyer *v.* Lowell, 44 Mo. 328; Flanagan *v.* Hutchinson, 47 Mo. 237; Rogers *v.* Gosnell, 51 Mo. 466; 58 Mo. 589; Schuster *v.* Kas. City, etc., Ry. Co., 60 Mo. 290; Mosman *v.* Bender, 80 Mo. 579; Green *v.* Estes, 82 Mo. 337; Ellis *v.* Harrison, 104 Mo. 270; Winn *v.* Lippincott Investment Co., 125 Mo. 528; State *v.* St. Louis & S. F. Ry. Co., 125 Mo. 596, 615; Porter *v.* Woods, 138 Mo. 540; Beardslee *v.* Morgner, 4 Mo. App. 139; Harvey Lumber Co. *v.* Herriman Lumber Co., 39 Mo. App. 214; Nelson Distilling Co. *v.* Loe, 47 Mo. App. 31; Tennent-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196; Street *v.* Goodale, 77 Mo. App. 318; Rothwell *v.* Skinker, 84 Mo. App. 169. Two early cases *contra* are overruled. Manny *v.* Frasier, 27 Mo. 419; Page *v.* Becker, 31 Mo. 466.

NEBRASKA. Shamp *v.* Meyer, 20 Neb. 223, Meyer *v.* Shamp, 26 Neb. 730, 51 Neb. 424; Fonner *v.* Smith, 31 Neb. 107; Kaufman *v.* U. S. Nat. Bank, 31 Neb. 661; Barnett *v.* Pratt, 37 Neb. 349; Union Pac. Ry. Co. *v.* Metcalf, 50 Neb. 452, 461; Tecumseh Nat. Bank *v.* Best, 50 Neb. 518.

NEVADA. Alcalda *v.* Morales, 3 Nev. 132; Bishop *v.* Stewart, 13 Nev. 25; Jones *v.* Pacific Wood Co., 13 Nev. 359, 375; Miliani *v.* Tognini, 19 Nev. 133.

NEW JERSEY. Berry *v.* Doremus, 30 N. J. L. 399; Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141. See also Price *v.* Trusdell, 28 N. J. Eq. 200, 202; Katzenbach *v.* Holt, 43 N. J. Eq. 536, 550; Bennett *v.* Merchantville Building Assoc., 44 N. J. Eq. 116, 118; Cocks *v.* Varney, 45 N. J. Eq. 72, 77.

NEW YORK. Gold *v.* Phillips, 10 Johns. 142; Farley *v.* Cleveland, 4 Cow. 432; 9

Cow. 639; Ellwood *v.* Monk, 5 Wend. 235; Barker *v.* Bucklin, 2 Denio 45; Del. & Hudson Canal Co. *v.* estchester County Bank, 4 Denio 97; Lawrence *v.* Fox, 20 N. Y. 268; Judson *v.* Gray, 17 Horr. Pr. 289; Dingeldein *v.* Third Avenue R. R. Co., 37 N. Y. 575; Barker *v.* Bradley, 42 N. Y. 316; Coster *v.* Mayor of Albany, 43 N. Y. 399; Secor *v.* Lord, 3 Keyes 525; Hutchings *v.* Miner, 46 N. Y. 456, 460; Claflin *v.* Ostrom, 54 N. Y. 581; Barlow *v.* Myers, 64 N. Y. 41; Arnold *v.* Nichols, 64 N. Y. 117; Litchfield *v.* Flint, 104 N. Y. 543; Hallenbeck *v.* Kindred, 109 N. Y. 620; Warren *v.* Wilder, 114 N. Y. 209; Hannigan *v.* Allen, 127 N. Y. 639; Clark *v.* Howard, 150 N. Y. 232; Seaman *v.* Hasbrouck, 35 Barb. 151; Adams *v.* Wadhams, 40 Barb. 225; Brown *v.* Curran, 14 Hun 260; Cock *v.* Moore, 18 Hun 31; Kingsbury *v.* Earle, 27 Hun 141; Schmid *v.* N. Y., etc., Railway, 32 Hun 335, affid. 98 N. Y. 634; Edick *v.* Green, 38 Hun 202; Pulver *v.* Skinner, 42 Hun 322; Reynolds *v.* Lawton, 62 Hun 596; Bogardus *v.* Young, 64 Hun 398; Cook *v.* Berrott, 66 Hun 633; Beemer *v.* Packard, 92 Hun 546. But see Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Merrill *v.* Green, 55 N. Y. 270; Wheat *v.* Rice, 97 N. Y. 296; Serviss *v.* McDonnell, 107 N. Y. 260; Corner *v.* Mackey, 147 N. Y. 574, 582; Fairchild *v.* Feltman, 32 Hun 398; Metropolitan Trust Co. *v.* New York, etc., Ry. Co., 45 Hun 84; Clark *v.* Howard, 74 Hun 228; Feist *v.* Schiffer, 79 Hun 275.

OHIO. Crumbaugh *v.* Kugler, 3 Ohio St. 544, 549; Bagaley *v.* Waters, 7 Ohio St. 359; Dodge *v.* Nat. Exchange Bank, 30 Ohio St. 1; Emmitt *v.* Brophy, 42 Ohio St. 82.

OREGON. Baker *v.* Eglin, 11 Oreg. 333; Hughes *v.* Oregon Co., 11 Oreg. 437; Schneider *v.* White, 12 Oreg. 503; Strong *v.* Kamm, 13 Oreg. 172; Feldman *v.* McGuire, 34 Oreg. 310. But see *contra* Washburn *v.* Interstate Invest. Co., 26 Oreg. 436.

PENNSYLVANIA. Strohecker *v.* Grant, 16 S. & R. 237, 241; Hind *v.* Holdship, 2 Watts, 104; Commercial Bank *v.* Wood, 7 W. & S. 89; Beers *v.* Robinson, 9 Barr 229; Bellas *v.* Fagely, 19 Pa. 273; Townsend *v.* Long, 77 Pa. 143; White *v.* Thielens, 106 Pa. 173; Delp *v.* Brewing Co., 123 Pa. 42. But see *contra* Blymire *v.* Boistle, 6 Watts 182; Ramsdale *v.* Horton, 3 Barr 330; Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470; Kountz *v.* Holthouse, 85 Pa. 235, 237; Adams *v.* Kuehn, 119 Pa. 76; Freeman *v.* Pa. R. R. Co., 173 Pa. 274. See also Brown *v.* German-American Title & Trust Co., 174 Pa. 443, 455.

RHODE ISLAND. Merriman *v.* Social Mfg. Co., 12 R. I. 175; Wood *v.* Moriarty, 15 R. I. 518; Kehoe *v.* Patton, 50 Atl. Rep. 655.

SOUTH CAROLINA. See McBride *v.* Floyd, 2 Bailey 209; Brown *v.* O'Brien, 1 Rich. 268; Redfearn *v.* Craig, 57 S. C. 534.

TENNESSEE. Moore *v.* Stovall, 2 Lea 543; Lookout Mountain R. R. Co. *v.* Houston, 1 Pickle 224; O'Conner *v.* O'Conner, 88 Tenn. 76, 82. But see Campbell *v.* Findley, 3 Humph. 330.

TEXAS. Spann *v.* Cochran, 63 Tex. 240; Bennett *v.* Rosenthal, 3 Willson Civ. Cas. 196· Bartley *v.* Conn, 4 Tex. Civ. App. 299; 33 S. W. Rep. 604.

UTAH. Brown *v.* Markland, 16 Utah 360.

VERMONT. See Arlington *v.* Hinds, 1 D. Chip. 430; Pangborn *v.* Saxton, 11 Vt. 79, *semble;* Corey *v.* Powers, 18 Vt. 587; Rutland R. R. Co. *v.* Cole, 24 Vt. 33; Chapman *v.* Mears, 56 Vt. 389; Congregational Soc. *v.* Flagg, 72 Vt. 248.

VIRGINIA. Vanmeter's Ex. *v.* Vanmeters, 3 Gratt. 148 (in equity); Jones *v.* Thomas, 21 Gratt. 96 *semble.* See also Code, § 2415. *Contra* is Stewart *v.* James River & Kanawha Co., 24 Gratt. 294.

WASHINGTON. Don Yook *v.* Washington Mill Co., 16 Wash. 459.

WEST VIRGINIA. Hooper *v.* Hooper, 32 W. Va. 526; Bensimer *v.* Fell, 35 W. Va. 15, 29; Code 1887, c. 71, § 2. But see *contra* Johnson *v.* McClung, 26 W. Va. 659.

WISCONSIN. Kimball *v.* Noyes, 17 Wis. 695; Putney *v.* Farnham, 27 Wis. 187; McDowell *v.* Laev, 35 Wis. 171; Bassett *v.* Hughes, 43 Wis. 319; Hoile *v.* Bailey, 58 Wis. 434; Winninghoff *v.* Witting, 64 Wis. 180; Johannes *v.* Phenix Ins. Co., 66 Wis. 50; Jones *v.* Foster, 67 Wis. 296, 309; Ingram *v.* Osborn, 70 Wis. 184, 193; Nix *v.* Wiswell, 84 Wis. 334; Fulmer *v.* Wightman, 87 Wis. 573; New York Life Ins. Co. *v.* Hamlin, 98 Wis. 17, 23.

NOTE III.

A mortgagee may sue at law a grantee of the mortgagor who assumes the mortgage.

ALABAMA. Orman *v.* North Alabama Co., 53 Fed. Rep. 469; 55 Fed. Rep. 18.

ARIZONA. Johns *v.* Wilson, 180 U. S. 446.

ARKANSAS. Patton *v.* Adkins, 42 Ark. 197; Benjamin *v.* Birmingham, 50 Ark. 433.

CALIFORNIA. Wormouth *v.* Hatch, 33 Cal. 121; Biddel *v.* Brizzolara, 64 Cal. 354; Williams *v.* Naftzger, 103 Cal. 438; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547; Tulare County Bank *v.* Madden, 109 Cal. 312; Hopkins *v.* Warner, 109 Cal. 133; Roberts *v.* Fitzallen, 120 Cal. 482; Daniels *v.* Johnson, 129 Cal. 415.

COLORADO. Green *v.* Morrison, 5 Col. 18; Stuyvesant *v.* Western Mtge. Co., 22 Col. 28; Skinner *v.* Harker, 23 Col. 333; Starbird *v.* Cranston, 24 Col. 20; Cobb *v.* Fishel, 62 Pac. Rep. 625.

CONNECTICUT. See Bassett *v.* Bradley, 48 Conn. 224; Lynch *v.* Moser, 72 Conn. 714. *Conf.* Meech *v.* Ensign, 49 Conn. 191. General Stat., § 983.

GEORGIA. See Ford *v.* Finney, 35 Ga. 258.

ILLINOIS. Rogers *v.* Herron, 92 Ill. 583; Thompson *v.* Dearborn, 107 Ill. 87; Bay *v.* Williams, 112 Ill. 91; Hazle *v.* Bondy, 173 Ill. 302; Webster *v.* Fleming, 178 Ill. 140; Cotes *v.* Bennett, 183 Ill. 82; Harts *v.* Emery, 84 Ill. App. 317; 184 Ill. 560; Baer *v.* Knewitz, 39 Ill. App. 470; Ingram *v.* Ingram, 71 Ill. App. 497; 172 Ill. 287; Robinson *v.* Holmes, 75 Ill. App. 203; Boisot *v.* Chandler, 82 Ill. App. 261; Eggleston *v.* Morrison, 84 Ill. App. 625; Murray *v.* Emery, 85 Ill. App. 348; 58 N. E. Rep. 327.

INDIANA. Day *v.* Patterson, 18 Ind. 114; McDill *v.* Gunn, 43 Ind. 315; Smith *v.* Ostermeyer, 68 Ind. 432; Rick *v.* Hoffman, 69 Ind. 137; Carnahan *v.* Tousey, 93 Ind. 561; Stanton *v.* Kenrick, 135 Ind. 382; Berkshire L. I. Co. *v.* Hutchings, 100 Ind. 496; Lowe *v.* Hamilton, 132 Ind. 406.

IOWA. Corbett *v.* Waterman, 11 Ia. 86; Moses *v.* Clerk, 12 Ia. 139; Thompson *v.* Bertram, 14 Ia. 476; Scott's Adm. *v.* Gill, 19 Ia. 187; Bowen *v.* Kurtz, 37 Ia. 239; Ross *v.* Kennison, 38 Ia. 396; Lamb *v.* Tucker, 42 Ia. 118; Luney *v.* Mead, 60 Ia. 469; Beeson *v.* Green, 103 Ia. 406.

KANSAS. Anthony *v.* Herman, 14 Kan. 494; Schmucker *v.* Sibert, 18 Kan. 104; Rickman *v.* Miller, 39 Kan. 362; Searing *v.* Benton, 41 Kan. 758; Anthony *v.* Mott, 61 Pac. Rep. 509.

LOUISIANA. Ferguson's Succession, 17 La. Ann. 255; Vinet *v.* Bres, 48 La. Ann. 1254.

MINNESOTA. Jordan *v.* White, 20 Minn. 91; Follansbee *v.* Johnson, 28 Minn. 311; Lahmers *v.* Schmidt, 35 Minn. 434; Scanlan *v.* Grimmer, 71 Minn. 351.

MISSISSIPPI. Vigniau *v.* Ruffins, 1 Miss. 312; Lee *v.* Newman, 55 Miss. 365.

MISSOURI. Belt *v.* McLaughlin, 12 Mo. 433; Cress *v.* Blodgett, 64 Mo. 449; Heim *v.* Vogel, 69 Mo. 529; Fitzgerald *v.* Barker, 4 Mo. App. 105; 70 Mo. 685; 13 Mo. App. 192; 85 Mo. 13; 96 Mo. 661; Nelson *v.* Brown, 140 Mo. 580; Pratt *v.* Conway, 148 Mo. 291; Saunders *v.* McClintock, 46 Mo. App. 216; Commercial Bank *v.* Wood, 56 Mo. App. 214; Wayman *v.* Jones, 58 Mo. App. 313; Am. Nat. Bank *v.* Klock, 58 Mo. App. 335. Page *v.* Becker, 31 Mo. 466, *contra*, is overruled.

NEBRASKA. Cooper *v.* Foss, 15 Neb. 515; Bond *v.* Dolby, 17 Neb. 49; Rockwell *v.* Blair Bank, 31 Neb. 128; Hare *v.* Murphy, 45 Neb. 809.

NEVADA. Ruhling *v.* Hackett, 1 Nev. 360.

NEW YORK. Burr *v.* Beers, 24 N. Y. 178; Ricard *v.* Sanderson, 41 N. Y. 179; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Campbell *v.* Smith, 71 N. Y. 26; Parkinson *v.* Sherman, 74 N. Y. 88; Thayer *v.* Marsh, 75 N. Y. 340; Ayers *v.* Dixon, 78 N. Y. 318, 323; Judson *v.* Dada, 79 N. Y. 373; Hand *v.* Kennedy, 83 N. Y. 149; Root *v.* Wright, 84 N. Y. 72; Gifford *v.* Corrigan, 117 N. Y. 257; New York L. I. Co. *v.* Aitkin, 125 N. Y. 660; Wager *v.* Link, 134 N. Y. 122, 150 N. Y. 549; Blass *v.* Terry, 156 N. Y. 122; Rush *v.* Dilks, 43 Hun 282. But see cases cited *ante*, p. 788, n. 5.

NORTH DAKOTA. See Moore *v.* Booker, 4 N. D. 543.

OHIO. Thompson *v.* Thompson, 4 Ohio St. 333, 353; Brewer *v.* Maurer, 38 Ohio St. 543; Society of Friends *v.* Haines, 47 Ohio St. 423; Pendery *v.* Allen, 50 Ohio St. 121.

PENNSYLVANIA. Hoff's App. 24 Pa. 200; Lenning's Est., 52 Pa. 135, 139; Merriman *v.* Moore, 90 Pa. 78; Blood *v.* Crew Levick Co., 177 Pa. 606; Wunderlich *v.* Sadler, 189 Pa. 469, 470.

RHODE ISLAND. Urquhart *v.* Brayton, 12 R. I. 169; Mechanics Savings Bank *v.* Goff, 13 R. I. 569.

SOUTH DAKOTA. Granger *v.* Roll, 6 S. D. 611; Miller *v.* Kennedy, 12 S. D. 478, 481; Hull *v.* Hayward, 13 S. D. 291, 295; Connor *v.* Jones, 72 N. W. Rep. 463.

TENNESSEE. Moore *v.* Stovall, 2 Lea, 543.

TEXAS. McCown *v.* Schrimpf, 21 Tex. 22; Huffman *v.* Western Mortgage Co., 13 Tex. Civ. App. 169.

UTAH. Clark *v.* Fisk, 9 Utah 94; Thompson *v.* Cheesman, 15 Utah 43; McKay *v.* Wood, 20 Utah 149.

WASHINGTON. Ordway *v.* Downey, 18 Wash. 412; Ver Planck *v.* Lee, 19 Wash. 492.

WISCONSIN. Bishop *v.* Douglas, 25 Wis. 696; Kollock *v.* Parcher, 52 Wis. 393; Palmeter *v.* Carey, 63 Wis. 426; Enos *v.* Sanger, 96 Wis. 150; Morgan *v.* South Milwaukee Co., 97 Wis. 275; Stites *v.* Thompson, 98 Wis. 329.